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The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws—Which Interest Prevails?

by
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"ONE NATION, UNDER GOD, INDIVISIBLE, WITH LIBERTY AND JUSTICE FOR ALL[1]"

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1. From the Pledge of Allegiance. This small part of the pledge of allegiance ironically portrays the conflict discussed in this Note. Discrimination laws are presumably enacted to eliminate acts which cause dissention in society—hence, "One Nation . . . Indivisible . . . " is the goal. On the other hand, historically we are a nation "Under God," respecting the right of others to believe and worship as they may. An emotional conflict arises when discrimination laws seeking to make us a unified nation are violated by one claiming a religious privilege. Is it possible to provide "Liberty and Justice for All?"

Introduction

The federal and state constitutions guarantee the right to free exercise of religion. Congress and a majority of state legislatures have enacted statutes to protect citizens against discrimination when renting or purchasing housing. Both free exercise rights and housing discrimination protections are highly valued in our society. In fact, it is difficult to find interests that elicit such emotional responses as are aroused when either is threatened. In the last six years, however, cases have arisen that seemingly endanger both interests. In these cases, religious freedom and housing discrimination protections are asserted directly against each other, and the court faces an emotionally-charged decision: one interest must win and another must lose.

One of the most paramount of American rights is freedom of religion. It is no accident that it is the first fundamental right listed in the Bill of Rights. The colonists who ratified the United States Constitution without a Bill of Rights were anxious to amend it to include a guarantee of religious freedom.[2] The early settlers had journeyed to America to escape religious persecution in their European homelands because of the lack of protection for religion.[3] Though almost all col-

2. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1579 (1989).

3. Everson v. Board of Educ. of the Township of Ewing, 330 U.S. 1, 8 (1947); Kathleen P. Kelly, Note, *Abandoning the Compelling Interest Test in Free Exercise Cases: Em-*

onists were Christians,[4] there were numerous sects of Christianity in colonial America.[5] Even after independence was achieved, one church often dominated individual states, and citizens realized that the new union's coherence depended on guaranteeing that the new federal government would not favor one religion over another.[6] As a result, the Framers drafted the First Amendment, guaranteeing that the federal government would not abridge the free exercise of religion, nor make any law regarding an establishment of religion.

Almost 200 years later another issue caused as much concern for the preservation of a unified nation: civil rights. On April 10, 1968, congressmen on the floor of the House of Representatives debated a piece of civil rights legislation to quell the rising tide of anger and racial tension bringing fear and hysteria to the nation.[7] That week's events had been horrifying: Dr. Martin Luther King was assassinated, and rioting had followed his murder.[8] The bill being debated was the so-called "anti-riot legislation," but it contained a portion which prohibited racial discrimination in housing.[9] Feeling pressed to respond to the urgency of the nation's condition, the House Rules Committee allowed only one hour for debate and prohibited amendments.[10] The legislation passed and later formed the foundation for the Fair Hous-

ployment Division, Department of Human Resources v. Smith, 40 CATH. U. L. REV. 929, 934 (1991).

4. United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840) (No. 14,990).

5. *Everson*, 330 U.S. at 10; Adams & Emmerich, *supra* note 2, at 1567 n.29, 1629.

6. 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 730-31 (Leonard W. Levy ed., Macmillan Pub. Co. 1986).

7. 114 CONG. REC. 9554-9608 (1968).

8. Representative Cohelan summarized the week's events:

> I must share with you the deep disappointment and regret I have felt over the last 6 unhappy days.
>
> I have just returned from the funeral of Dr. Martin Luther King, Jr. . . . Suffice it to say that the sadness of the whole Nation bespeaks the massive loss which we have suffered with the passing of this extraordinary man. . . .
>
> These last 6 days have brought an abject shame on this country.
>
> First the coldblooded murder of Dr. King.
>
> The shame and the tragedy could not have been greater, as an apostle of a peaceful America, equally open to all its citizens, a man who believed his country could and would meet its challenges and provide for its people, was violently struck down.
>
> That violence begot more violence.
>
> In scores of cities, in the Nation's Capital, men have been killed, homes and businesses destroyed, thousands of families have been disrupted. Helmeted and armed troops patrol our major cities.
>
> As the Palm Sunday weekend of murder, pillage, and destruction unfolded, I could not help asking myself, "What will it take to awake this great country to the anger, frustration, and despair that afflict it?"

Id. at 9577.

9. *Id.* at 9554.

10. *Id.* at 9576.

ing Act. The legislation served as a symbol of cooperation extended from Congress to African-Americans in a time of national turmoil.[11]

Such were the beginnings of free exercise rights and housing discrimination protections in federal law; nonetheless, federal codification of these two interests lagged behind the legislation of many states. Colonial constitutions guaranteed free exercise rights well before the United States Constitution was amended to add them.[12] Twenty-two states had already passed housing discrimination statutes before Congress passed its version in 1968.[13]

Both freedoms—to believe and practice one's religion and to obtain housing for which one is qualified without regard to race or other protected characteristics—are of great worth in our society. Several states, however, have seen cases in which a landlord could not comply with marital status discrimination prohibitions because they conflicted with his religious beliefs. Hypothetical scenarios involving conflicts between various discrimination laws and free exercise follow:

1. Michelle and Michael have been dating for five years and have decided to live together. Neither, however, desires to marry until they are certain they are compatible. They both begin to look for an apartment to share by visiting each of the three apartment complexes in their small community. All three complexes are owned by Peter, a deeply religious man who considers it a sin for couples to live together outside of marriage. Peter says he feels he would be "aiding and abetting" in their sin by renting to them and would incur sin upon himself.
2. John and David have been shopping for an apartment to share and have found one they would like to rent—a small studio built onto a large home in the suburbs. After they complete the application, the homeowner, a pious man who believes homosexuality is a sin, asks them if they are homosexual. After John and David answer in the affirmative, the homeowner abruptly tells them he has no vacancy for them.
3. Amanda, an African-American, is looking for an apartment in the city to which she has just moved. A co-worker informs her of an available flat that she can afford. When Amanda enters the manager's office to inquire about the flat, he shouts racial epithets at

11. *See* text accompanying note 124.

12. ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 98 (1948).

13. 114 CONG. REC. 9582 (1968). The represented states were: Alaska, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Wisconsin. *Id.* Twenty-one of those statutes provided broader protection against racial discrimination in housing than the federal statute. *Id.*

her and angrily tells her to get off his property. Unbeknownst to Amanda, the manager is a member of a small cult which believes that the Bible advocates separation of the races and that African-Americans are evil.

In all three cases, a court must decide if constitutional guarantees of free exercise of the landlord's religion are important enough to overcome statutory prohibitions against discrimination in housing, or if the governmental objective of eradicating discrimination justifies curtailing a fundamental right.

Four states have dealt with the conflict between free exercise and anti-discrimination statutes in their courts within the last six years.[14] Though housing discrimination statutes protect many characteristics, all four states' supreme courts addressed marital status discrimination allegations. The cases demonstrate the difficulty of the conflict between the two interests: there is no middle ground for a court to reach in any one particular case. Only one interest can prevail, while the other must fail.

This Note explores the nature of the conflict by viewing each interest as it stands alone and then addressing the conflict created when they are opposed to each other. Part One revisits the origin of the Free Exercise Clause of the United States Constitution and its important place in our society's system of values. Part One will also discuss the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith*[15] (hereinafter *E.D. v. Smith*), which reduced the level of scrutiny courts need apply when determining if a statute's burden upon free exercise rights is legally acceptable,[16] as well as Congress' response to the decision, the Religious Freedom Restoration Act.[17] Finally, Part One compares state consti-

14. Swanner v. Anchorage Equal Rights Comm'n *ex rel.* Bowles, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed as improvidently granted*, 859 P.2d 671 (Cal. 1993) (depublished from official reporter); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). All cases involved facts similar to scenario one.

The federal system is just beginning to hear such cases—although only on the district court level. *See, e.g.*, Wilson v. Glenwood Intermountain Properties, 876 F. Supp. 1231 (D. Utah 1995) (Brigham Young University as intervener) (alleging gender, marital status, and religious discrimination in housing against landlords who contracted with the university to provide off-campus housing and correspondingly complied with the university's moral code for students).

15. 494 U.S. 872 (1990).

16. *Id.* at 879. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring).

17. 42 U.S.C. § 2000bb to 2000bb-4 (1994).

tutional free exercise provisions and contrasts those provisions to the federal constitution.[18] Part Two discusses housing discrimination statutes. This Part addresses the federal Fair Housing Act,[19] its origins and development through amendment and case law, and similar state statutes.[20] Part Three untangles the results and reasoning of the four state supreme courts who resolved the competing interests. This Part identifies various elements of the courts' reasoning and compares the discussions of the courts with respect to each element. For example, this Part addresses each of the steps in the analysis to determine if a free exercise exemption to a law is warranted. Part Three also discusses some courts' use of a hierarchy of discrimination approach, which supports that race and gender discrimination prohibitions will always prevail over free exercise in a conflicts case. The hierarchy approach illustrates why the difficult cases are those which present marital status discrimination—a lesser category than race or gender discrimination—in conflict with free exercise rights.

Part Three of this Note concludes with practical suggestions for courts and legislatures when faced with the challenge of untangling this conflict. So far, state supreme courts have opted to enforce one interest at the expense of the other. Regardless of the interest chosen, however, these bright-line rules often yield unreasonable results. For example, a state that emphasizes free exercise rights in all circumstances gives license to a landlord to discriminate in leasing, even if he owns all the apartments in a city. On the other hand, an anti-discrimination state would forbid a homeowner from preferring to rent to a married, versus unmarried, couple. Part Three proposes a rule that can be applied reasonably in most situations. This rule distinguishes between large and small landlords and removes the necessity for states to choose one interest over the other for all situations.

18. The parameters of this Note do not allow for an analysis of the free exercise clauses of every state constitution. Only the constitutions of the four states whose courts have decided cases of conflict between state housing discrimination statutes and state free exercise clauses are addressed. The four states are Alaska, California, Massachusetts and Minnesota.

19. *See* 42 U.S.C. § 3601-03, 3604 (1994).

20. Again, the scope of this Note does not allow for an analysis of such statutes for every state. Hence the only statutes addressed specifically are those from states whose courts have addressed the religion/discrimination conflict—Alaska, California, Massachusetts and Minnesota. *See supra* note 18.

I. "ONE NATION, UNDER GOD . . .": Protecting Religious Freedoms

A. The United States Constitution—The First Amendment Religion Clauses

An overview of the historical background of the right to free exercise helps delineate the weight that free exercise should be accorded in our complex scheme of rights.[21]

Among the many challenges to the ratification of the newly written United States Constitution was the recurring objection that the document lacked an enumeration of specific rights.[22] Among those rights that the colonists desired to put beyond the reach of the new federal government was the right to believe and worship as they wished.[23] Thus, during the process of ratification of the Constitution, the colonists made clear to the founders that they wanted a Bill of Rights drafted in the First Congress.[24] While colonial constitutions already guaranteed religious liberty, the colonists wanted to prevent overreaching by the new federal government.[25]

In the First Congress, James Madison presented his first draft of a religion clause which read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[26] After some alteration in the House and then in the Senate, a conference committee was organized.[27] With Madison as chair, the committee drafted language which, upon acceptance, was listed first in the Bill of Rights.[28] The First Amendment reads in pertinent part: "Congress shall make no

21. A more thorough examination of the history of the religion clauses of the First Amendment can be found in many sources including the following: Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting) (discussing the history of the religion clauses); Adams & Emmerich, *supra* note 2, at 1579-82 (addressing the legislative history of the religious clauses); BROADUS MITCHELL & LOUISE PEARSON MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 197-201 (2d ed. 1975) (discussing Madison's introduction of the bill of rights and the ensuing debate in Congress).

22. 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 6, at 1538-39; Adams & Emmerich, *supra* note 2, at 1579.

23. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 94 (1980).

24. 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 6, at 730.

25. *Id.*; KELLY & HARBISON, *supra* note 12, at 98.

26. 1 ANNALS OF CONGR. 451 (Joseph Gales ed., 1789).

27. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 963-64 (Johnny H. Killian ed., 1987).

28. Adams & Emmerich, *supra* note 2, at 1579-82. The committee members were: Oliver Ellsworth (Connecticut), Charles Carroll (Maryland), William Paterson (New Jersey), Roger Sherman (Connecticut), John Vining (Delaware) and James Madison (Virginia).

law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[29]

History does not reveal much about the intended interpretation of the religion clauses. There is no record of Madison's committee meetings,[30] and the debates over the clauses are not "particularly illuminating."[31] Nevertheless, the present courts' and legal commentators' views of the founders' intentions influence the relative degree of importance the religion clauses are given in today's First Amendment jurisprudence. For example, John Hart Ely stated: "[F]or the framers religion was an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature."[32] Without abandoning historical perspective, present commentators are of the impression that the two religious clauses[33] are to be read together to further the goal of religious liberty.[34] The fact that commentators continue to advocate religious freedom amidst an ever-increasing number of cases challenging its pedestal position in the scheme of constitutional rights demonstrates the strength of this goal.[35]

In the federal system, however, religious interests seem to have lost ground over the past several years. Particularly, the Supreme

29. U.S. CONST. amend. I. The First Amendment was subsequently ratified on December 15, 1791. Adams & Emmerich, *supra* note 2, at 1581.

30. Adams & Emmerich, *supra* note 2 at 1581.

31. Wallace v. Jaffree, 472 U.S. 38, 95 (1985) (Rehnquist, J., dissenting).

32. ELY, *supra* note 23, at 94.

33. The two clauses are the Establishment Clause ("Congress shall make no law respecting an establishment of religion") and Free Exercise Clause ("or prohibiting the free exercise thereof"). U.S. CONST. amend I.

34. *See* Adams & Emmerich, *supra* note 2, at 1598; Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 677 (1980). *See also* Adams & Emmerich, *supra* note 2, at 1599-1602 (discussing the idea of liberty of conscience as the focal philosophy of early American political thinkers, including Madison, Jefferson, Williams, and Penn).

35. The commentators' thoughts are especially noteworthy amidst the numerous cases and law review articles that address conflicts between the two clauses themselves. An example of a conflict in this area of law is illustrated by the following: a defendant is charged with a crime to which he defends by arguing the prescribed, or proscribed, conduct offends his religious mores, and that therefore, he cannot conform. The argument follows that if the government were to excuse the defendant's conduct, or if the court were to void the law as interfering with the defendant's free exercise rights, the government would effectively be violating the Establishment Clause by favoring defendant's religious position. Courts, presumably to avoid this conflict, separate the clauses and decide cases according to one clause or the other and develop jurisprudence of each separately. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 6. Yet commentators argue that the clauses should be read with one original end in mind—religious liberty. *See* Adams & Emmerich, *supra* note 2, at 1598; Arlin M. Adams & Sarah B. Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 337 (1988). In order to avoid this complex area, this article focuses only on conflicts between the Free Exercise Clause and housing discrimination laws.

Court's decision in *E.D. v. Smith*[36] lowered the level of justification needed to infringe upon one's free exercise rights.[37] However, several states have opted not to follow *E.D. v. Smith*, but to continue to support free exercise over competing interests. For example, at least two of the four states that have dealt with a conflicts case (and which are discussed in this Note) have decided not to use the *E.D. v. Smith* standard, but to continue to use the higher strict scrutiny standard in deciding cases of conflict with free exercise rights.[38]

Religious freedom has never been without its challenges, historically and presently.[39] In the 1879 case of *Reynolds v. United States*, the Court affirmed the constitutionality of a law criminalizing polygamy, notwithstanding the defendant's argument that the Free Exercise Clause authorized the practice directly connected with his religious dictates.[40] In another case, the Court clarified *Reynolds* by noting that the antipolygamy law was a general marital law, not directed towards restricting religious practice.[41] In *Minersville School District v. Gobitis*, Jehovah's Witnesses challenged the expulsion from school of children who refused to salute the flag for religious reasons.[42] The Supreme Court rejected the free exercise argument.[43] Sixty-one years after *Reynolds*, the Court decided that mandatory vaccinations were constitutional, notwithstanding that some religious beliefs forbade the inoculation procedure.[44] Thus, in these cases, free exercise rights gave way to the interests of the regulation of marriage and the protection of the health of a community.

In the same year that *Minersville* was decided, the Court held that the First Amendment religion clauses applied to the states through the

36. 494 U.S. 872 (1990). Despite the rule adopted in *E.D. v. Smith*, the Supreme Court has not disavowed past acknowledgement of the fundamental nature of religious freedom in constitutional jurisprudence. Johnson v. Robison, 415 U.S. 361, 375 n. 14 (1974) (stating that free exercise of religion is a fundamental right). In *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 226 (1963), for example, the Court stated, "[t]he place of religion in our society is an exalted one."

37. E.D. v. Smith, 494 U.S. at 882-90.

38. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994); State by Cooper v. French, 460 N.W.2d 2, 8-9 (Minn. 1990).

39. Regarding conflicts cases, there is no conflict issue for a court to decide if: 1) it is established that the law was enacted to harm a particular religion or 2) the party seeking an exemption from a law for religious reasons can not show that complying with the law burdens the practice of the religion. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.1.

40. 98 U.S. 145, 166 (1986).

41. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

42. *Id.* at 591-92.

43. *Id.* at 593-95. In 1943, *Minersville* was overruled in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), on free speech grounds rather than free exercise grounds.

44. Jacobson v. Massachusetts, 197 U.S. 11, 9 (1905).

due process clause of the Fourteenth Amendment in *Cantwell v. Connecticut*.[45] In that case, the Supreme Court held that the First and Fourteenth Amendments guaranteed the right to proselytize in public. Three years later, the Court decided a number of important cases in First Amendment jurisprudence, including *West Virginia Board of Education v. Barnette* which overruled *Minersville*.[46] Along the same lines as *Cantwell*, the Court upheld the right to distribute religious pamphlets in public[47] and to ring doorbells to distribute such literature.[48] The Supreme Court further expanded rights under the Free Exercise Clause that year in *Murdock v. Pennsylvania*, which held that a tax on soliciting orders could not be applied to Jehovah's Witnesses who solicited literature door-to-door.[49] Thus, in the above cases decided in 1943, the Court expanded religious rights.

The next year, however, the Supreme Court reviewed a conviction of a Jehovah's Witness for child labor violations.[50] The defendant violated a child labor law when a minor accompanied her as she sold religious literature in the streets.[51] Balancing the defendant's religious interest with the state's interest in protecting minors, the Court found the state's interest more significant and affirmed the defendant's conviction.[52]

In 1961, Orthodox Jews presented a conflict created by state law to the Court.[53] They desired an exemption from a law requiring the closure of businesses on Sunday pursuant to the state's goal of providing a uniform day of rest.[54] Because Orthodox Jews observe the Sabbath on Saturday, they could either observe the Sabbath in accordance with their religion and suffer a competitive disadvantage by being closed two days of the week, or conform with the rest of the community while working contrary to their religion.[55] The Orthodox Jews argued that the latter, less economically restrictive, alternative burdened their free exercise rights, and therefore, they were entitled to an exemption.[56] The Court disagreed, noting that the state could, but did not have to, grant an exemption.[57]

45. 310 U.S. 296, 303 (1940).
46. *See supra* note 41.
47. Jamison v. Texas, 318 U.S. 413, 417 (1943).
48. Martin v. City of Struthers, 319 U.S. 141, 146-7 (1943).
49. 319 U.S. 105, 117 (1943).
50. Prince v. Massachusetts, 321 U.S. 158, 161-63 (1944).
51. *Id.* at 159-60.
52. *Id.* at 170-71.
53. Braunfeld v. Brown, 366 U.S. 599 (1961); *see also*, Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961).
54. *Braunfeld*, 366 U.S. at 602-03.
55. *Id.* at 601-02.
56. *Id.* at 608-09.
57. *Id.*

In 1963, however, the Court ruled on behalf of the Free Exercise Clause in a case involving the denial of unemployment benefits.[58] In *Sherbert v. Verner* (hereinafter *Sherbert*), a Seventh-Day Adventist was discharged from a position that required working on the Sabbath and was denied unemployment benefits as a result.[59] The Court held that such a denial impermissibly burdened free exercise rights.[60] In *Wisconsin v. Yoder* (hereinafter *Yoder*), the Court protected Amish parents from a law requiring parents to send their children to school.[61] In both cases, the Court applied the strict scrutiny standard, which requires that the competing interest be compelling—of the highest order—and that the statute be narrowly tailored for free exercise restrictions to be justified.[62] Congress restored the strict scrutiny standard in the Religious Freedom Restoration Act[63] for use in federal courts after the Supreme Court disregarded it in *E.D. v. Smith.*[64] Under these pre-*E.D. v. Smith* cases, free exercise is a fundamental right which can only be infringed upon in limited circumstances by a compelling governmental interest. Both *Sherbert* and *Yoder* provide the standard used by many states in deciding cases of religious rights infringement.

Thomas v. Review Board of the Indiana Employment Security Division[65] also presented the Court with a free exercise argument for exemption from a law that arguably burdened religious practice. Indiana denied Thomas unemployment benefits because, for religious reasons, he refused a job at a plant which manufactured weapons.[66] The Court held such denial of benefits impermissibly burdened free exercise rights.[67] The next year, however, the Court decided that the governmental interest in exacting mandatory tax contributions from employers was a compelling interest and justified infringement of Amish employers' free exercise rights inasmuch as such contributions were contrary to Amish beliefs.[68]

In 1983, *Bob Jones University v. United States* called on the Court to balance the government's interest in eradicating racial discrimination against protection of free exercise rights.[69] A federal law provided that the tax-exempt status would be refused to schools that

58. Sherbert v. Verner, 374 U.S. 398 (1963).
59. *Id.* at 399-401.
60. *Id.* at 406.
61. 406 U.S. 205, 236 (1972).
62. *Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 214.
63. 42 U.S.C. § 2000bb(b)(1) (1994).
64. 494 U.S. 872, 878-79, 885 (1990).
65. 450 U.S. 707 (1981).
66. *Id.* at 709.
67. *Id.* at 719-20.
68. United States v. Lee, 455 U.S. 252, 260-61 (1982).
69. Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (decided with Goldsboro Christian Sch., Inc. v. United States).

discriminated on the basis of race.[70] Bob Jones University claimed that denial of tax exemption because of its religiously-motivated practice of race discrimination burdened its free exercise rights, and thus it was entitled to a free exercise exemption.[71] The Court disagreed, finding the government's interest in eliminating race discrimination compelling and outweighed any burden on free exercise rights imposed by denial of a tax benefit.[72]

As the chronology reveals, in the decisions of *Sherbert* and *Yoder*, in 1963 and 1972 respectively, and until 1990, the Court dealt with conflicts cases by weighing the opposing interests and by utilizing the strict scrutiny-compelling governmental interest standard. Unless the Court found that the statute burdening religious rights was narrowly tailored to further a compelling governmental interest, the party whose free exercise rights had been impaired prevailed, and relief was granted accordingly. In 1990, however, the Supreme Court decided *E.D. v. Smith*.[73] The controversial opinion,[74] written by Justice Scalia, declared that *Sherbert* and *Yoder* no longer represented the standard of review to be used in free exercise conflicts cases.[75] Justice Scalia, seemingly abruptly, rewrote the standard in the six-three decision.

E.D. v. Smith involved two members of the Native American Church who ingested the drug peyote at a church ceremony and were discharged from their jobs because of this drug use.[76] Later, the state denied their applications for unemployment compensation because their discharges were explained as resulting from work-related misconduct.[77] This case addressed the question of whether Oregon's prohibition of peyote, even for religious use, violated the Free Exercise Clause.[78] The Court acknowledged that a state prohibition against a religious belief or religious practice, specifically directed to that religion, would clearly be unconstitutional.[79] *E.D. v. Smith*, however, did not involve such a law.[80] The peyote prohibition had only the "inci-

70. *Id.* at 578-79, 595.

71. *Id.* at 602-03.

72. *Id.* at 602-04.

73. 494 U.S. 872 (1990).

74. *See* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 40 n.9 (1991) (depublished from official reporter); Ann E. Beeson, Comment, *Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1124 (1992); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 630-31 (1992); Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 520 (1994).

75. E.D. v. Smith, 494 U.S. at 884-85.

76. *Id.* at 874.

77. *Id.* at 874.

78. *Id.*

79. *Id.* at 877-78.

80. E.D. v. Smith, 494 U.S. at 882.

dental effect of a generally applicable and otherwise valid provision."[81] Thus, a neutral, generally applicable criminal law did not violate the free exercise rights even though it barred certain religious rituals.[82] As such, the burden on free exercise did not render the provision unconstitutional.[83]

Justice Scalia distinguished cases applying the *Sherbert* strict scrutiny standard to evaluate interests competing with religious rights by noting that post-*Sherbert* decisions "held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[84] Thus, he extrapolates a general rule from the holdings of prior conflicts cases while failing to emphasize that the *Sherbert* standard was applied to achieve the end results of those cases. Justice Scalia carries the argument further when he notes that although *Sherbert* had been used to analyze free exercise conflicts cases, it had never been used to invalidate criminal prohibitions.[85] In delivering a final fatal blow to *Sherbert*, Justice Scalia states: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense. . . . [and] would produce here — a private right to ignore generally applicable laws . . . ."[86]

Justice Scalia, however, created an exception to his own "generally applicable law" rule. In situations where at least one other constitutional right is threatened, in addition to the free exercise right, the strict scrutiny standard would be applied.[87] This so-called "hybrid" situation reinvigorates a *Sherbert*-like analysis and requires a compelling governmental interest to justify burdening a plurality of constitutional rights.[88]

The *E.D. v. Smith* decision was not popular with Congress and inspired a three-year congressional campaign to overturn it. Congress interpreted the decision as a blow to free exercise rights by making it

81. *Id.* at 878.
82. *Id.* at 890.
83. *Id.*
84. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).
85. E.D. v. Smith, 494 U.S. at 884-85.
86. *Id.* at 885-86. Ironically, Justice Scalia addressed a religious audience of late, encouraging them to "pray for the courage to endure the scorn of the sophisticated world." John Biskupic, *Justice Preaches to Christians—Ignore 'Scorn,'* S.F. CHRON., Apr. 10, 1996, at A3. In one reporter's account, Scalia "offered a scathing portrayal of a society that is not merely skeptical but that disparages religious belief and believers . . . ." *Id.*
87. E.D. v. Smith, 494 U.S. at 881.
88. *Id.* at 881-82.

easier to burden religious rights, if not to ignore them altogether.[89] As a result, in 1993, Congress passed the Religious Freedom Restoration Act,[90] (hereinafter "RFRA") which explicitly restored the *Sherbert* and *Yoder* standard—the compelling governmental interest standard—in free exercise jurisprudence.[91]

The House debates reveal the enormous popularity of RFRA.[92] In fact, the record is replete with support for the act in both houses of Congress[93] and in the Clinton administration.[94] The debates, one-sided in support of RFRA as they were, make clear that the intent of Congress was to remedy what was viewed as the Supreme Court's error in *E.D. v. Smith*.[95] The opinion was blamed as the cause of a number of decisions inimical to Congress' idea of free exercise rights and to "victims'" religious beliefs: autopsies were performed on Hmong and Jewish deceased persons;[96] Amish buggies were required to be outfitted with lights;[97] evangelical store-front churches were zoned out of commercial areas;[98] a Catholic hospital lost its accreditation because it would not perform abortions;[99] and a homeowner was denied the right to erect a cross on her property.[100] Congress recognized that religious interests will not always prevail; government interests will sometimes be compelling enough to justify subordinating free exercise rights—as with any constitutional and fundamental right.[101] Before minimizing the right to freedom of religion in favor of a competing interest, Congress intended to be clear that the superseding in-

89. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 360-61, 381 (1994).

90. 42 U.S.C. § 2000bb to 2000bb-4 (1994).

91. 42 U.S.C. § 2000bb(b) (1994) provides: "The purposes of this chapter are—(1) to restore the compelling interest test as set forth in Sherbert . . . and Wisconsin v. Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . ." Congress also does not hide the fact that it enacted RFRA expressly in response to *E.D. v. Smith*: "The Congress finds that . . . (4) in Employment Division v. Smith . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a) (1994).

92. 139 CONG. REC. H2356-63 (daily ed. May 11, 1993).

93. *Id.*; 139 CONG. REC. S14,461-71 (daily ed. Oct. 27, 1993).

94. *See* 139 CONG. REC. at H2358-59 (daily ed. May 11, 1993) (letter from the Attorney General).

95. *Id.* at H2356.

96. *Id.* at H2357.

97. *Id.*

98. *Id.* at H2360.

99. 139 CONG. REC. at H2361.

100. *Id.* at H2362.

101. *Id.* at H2360-61.

terest must occupy a more fundamental societal position pursuant to *Sherbert* and *Yoder*.

The United States Supreme Court has not yet reviewed RFRA,[102] nor has it decided any cases using its restored standard of review.[103] Some circuit courts and district courts, however, have begun to apply its standard.[104] If RFRA survives constitutional scrutiny, federal courts—and state courts which follow the federal analysis—already have established precedent regarding the restored standard of *Sherbert* and *Yoder*. Thus, only cases decided under the lower *E.D. v. Smith* standard between 1990 and 1993 will need to be disregarded.

B. State Constitutions—The Religion Clauses

The First Amendment's religion clauses serve state citizens by guaranteeing a minimal level of protection against government intrusion into the practice of religion. The states, however, can and often have drafted their own constitutions to offer broader protections. Even in some states where the phraseology of religion clauses in constitutions appears much the same as that in the First Amendment, state courts have interpreted their state constitutions as offering more protection than does the Federal Constitution.

The scope of this Note does not allow for an analysis of the religion clauses in each of the 50 states. Four states have been selected for illustration: the constitutions of the states of Alaska, California, Minnesota, and Massachusetts[105] each include a section granting free exercise protections.

Alaska's Freedom of Religion Clause is almost identical to that of the Federal Constitution.[106] The Alaska Supreme Court has inter-

102. One federal circuit court has upheld the constitutionality of RFRA. Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *reh'g. en banc, denied*, 83 F.3d 421, *and petition for cert. filed*, (June 25, 1996). Other courts have done likewise. *See* Sasnett v. Department of Corrections, 891 F. Supp. 1305, 1320-21 (W.D. Wis. 1995) (United States as intervenor); Belgard v. Hawaii, 883 F. Supp. 510, 512-17 (D. Haw. 1995).

103. However, Justice Thomas dissented from the Court's denial of certiorari in Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994). In his dissent, he reviews the purpose of RFRA and infers an opinion of constitutionality. *Id.* at 460-62.

104. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 654-56 (4th Cir. 1995); Cheema v. Thompson, No. 94-16097, 1994 U.S. App. LEXIS 24160, at 6-9 (9th Cir. Sept. 2, 1994); Davidson v. Davis, No. 92 Civ. 4040, 1995 U.S. Dist. LEXIS 1696, at *13-16 (S.D.N.Y. Feb. 14, 1995); Robinson v. Klotz, No. 94-1993, 1995 U.S. Dist. LEXIS 717, at *21-22 (E.D. Pa. Jan. 23, 1995); Woods v. Commissioner Parker Evatt, 876 F. Supp. 756, 761-62 (D.S.C. 1995); Western Presbyterian Church v. Board of Zoning Adjustment of the Dist. of Columbia, 862 F. Supp. 538, 544-47 (D.D.C. 1994); Riely v. Reno, 860 F. Supp. 693, 709 (D. Ariz. 1994).

105. Each of these states has addressed the issue of conflict between free exercise rights and anti-discrimination in housing laws.

106. ALASKA CONST. art. I, § 4. It reads: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

preted the clause to give no broader protection than is provided in the First Amendment.[107] In fact, until the California Supreme Court's decision in *Smith v. Fair Employment & Housing Commission*[108] (hereinafter *Smith v. FEHC*), Alaska was the only state of the four which did not offer broader free exercise protections than are guaranteed under the U.S. Constitution.

Prior to the California Supreme Court's decision in *Smith v. FEHC*, the California Courts of Appeal had assumed their state's constitution guaranteed broader free exercise protections.[109] Unlike Alaska, the religion clause in the California Constitution is worded quite differently from the First Amendment. It reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion . . . ."[110] In *Smith v. FEHC*, the state supreme court, in its plurality opinion, does not reject altogether the view of the Courts of Appeal, but instead uses cryptic language on the matter and avoids finality on this issue. At one point, the court states that it has applied a *Sherbert/Yoder* analysis.[111] The court later states that it had also used *E.D. v. Smith*-like language in upholding generally-applicable laws.[112] So, the extent to which the California Constitution protects free exercise in comparison to the U.S. Constitution is unclear.

In contrast, Minnesota went to great lengths in drafting and interpreting its constitution to provide greater religious freedom guarantees for its citizens. The religion clauses of its constitution are quite lengthy.[113] In interpreting the state's religious guarantees, Minne-

107. Bonjour v. Bonjour, 592 P.2d 1233, 1236 n.3 (Alaska 1979); *see generally* Frank v. State, 604 P.2d 1068, 1074 (Alaska 1979) (involving the prosecution for illegal transportation of game killed for religious funeral feast).

108. 913 P.2d 909 (Cal. 1996).

109. *See* Feminist Women's Health Ctr., Inc. v. Philobosian, 157 Cal. App. 3d 1076, 1085-86 (1984); Bennett v. Livermore Unified Sch. Dist., 193 Cal. App 3d 1012, 1016 (1987).

110. CAL. CONST. art. I, § 4.

111. Smith v. FEHC, 913 P.2d at 930-31.

112. *Id.*

113. MINN. CONST. art I, § 16 reads:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of

sota's Supreme Court stated that the state's "Freedom of Conscience Clause" provides more protection than the federal First Amendment and requires that the high "compelling state interest" standard apply to cases where other interests burden free exercise interests.[114]

Finally, Massachusetts, like Minnesota, seems to have gone to great lengths to draft an expansive constitutional guarantee of religious rights. Massachusetts' religion clauses can be found in two articles. Article of Amendment XVIII, section 1 reads: "No law shall be passed prohibiting the free exercise of religion."[115] Yet Article II goes farther in asserting not only a right, but a duty to worship.[116] Although the state's highest court has not made explicitly clear the intention to offer greater religious freedoms than the Federal Constitution, it *has* applied the higher *Yoder* and *Sherbert* standards, rather than the *E.D. v. Smith* standard, in deciding cases of conflict with free exercise rights.[117] This seems to indicate Massachusetts' intent to preserve state religious freedoms as occupying a fundamental position in the state's scheme of rights. Moreover, it seems reasonable to infer from the state's history that these religious protections are at least as expansive as those under the First Amendment. Massachusetts is an original colony and its constitution contained religious guarantees before the U.S. Constitution was even ratified.[118]

In sum, RFRA requires that cases of conflict with religious interest receive the highest—*Sherbert*—level of scrutiny. Without strict scrutiny, religious freedoms do not enjoy the same degree of protection granted other constitutionally-based fundamental interests such as freedom of speech. In effect, the United States Supreme Court es-

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the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Id.

114. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992); *see also* State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (opining that the language of the Minnesota Freedom of Conscience Clause is stronger than the language of the federal First Amendment religion clauses).

115. MASS. CONST. amend. art. XVIII, §1.

116. MASS. CONST. Pt. I, art. II. Titled "Right and Duty of Worship; freedom of religion," the article reads:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Id.

117. Attorney Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994).

118. For a history of the Massachusetts Constitution, *see* Society of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990).

tablished, in *E.D. v. Smith*, a hierarchy of constitutional values and relegated free exercise rights to a lower tier. Religious freedom interests do not merit strict scrutiny and therefore receive less protection than other constitutional rights when compromised alone. Under *E.D. v. Smith*, the compelling governmental interest standard, and corresponding status as a fundamental right, are only reinstated when another constitutional right is threatened by the same opposing law or regulation—*E.D. v. Smith*'s "hybrid" situation.

E.D. v. Smith is difficult to rationalize when considering the importance the founders, and more importantly the colonists they represented in the First Congress, placed on religious freedoms. Justice O'Connor commented in *Bowen v. Roy*:[119]

> Even if the Founding Fathers did not live in a society with the [programs] that the Federal Government administers today, . . . they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause.[120]

Figuratively speaking, in *E.D. v. Smith*, Justice Scalia removed the religion clauses from their premier placement in the list of the Bill of Rights and placed them below all others. Congress, recognizing the anomaly, passed RFRA to remedy *E.D. v. Smith* and to restore religious freedom as a fundamental right. Until RFRA's constitutionality is affirmed, it is unclear how long this restored status will last.

In each state court system, however, courts have always been free to use strict scrutiny despite federal system trends. In fact, one major question states must ask in deciding conflicts cases is whether to limit free exercise guarantees to those protected under the First Amendment, as defined by contemporary federal free exercise jurisprudence, or to expand them. Applying strict scrutiny on behalf of religious interests will often serve to tip the scales in favor of religious interests.

II. "ONE NATION . . . INDIVISIBLE": Eradicating Discrimination in Housing

A. The Federal Approach

The federal statutes prohibiting discrimination in the sale or rental of housing are collectively known as the Fair Housing Act[121] (hereinafter "FHA"). Although the FHA began as just one of eight titles within the Civil Rights Act of 1968, it is now viewed as one of the nation's most important laws in preserving civil rights.

119. 476 U.S. 693 (1986) (O'Connor, J., concurring in part and dissenting in part).
120. *Id.* at 732.
121. 42 U.S.C. §§ 3601-31 (1994).

In 1968, the nation was in turmoil. The assassination of Dr. Martin Luther King, Jr., a champion of the civil rights movement, resulted in widespread fear and hysteria as rioting escalated throughout the country.[122] Troops in full battle gear guarded the Capitol Building in Washington D.C.[123] Inside, congressmen in the House of Representatives debated the then so-called "anti-riot" legislation of which the "open housing" provision, now the foundation of the FHA, was a part. Some representatives admitted their support for the legislation was aimed at regaining peacefulness by quelling the anger of the rioters.[124] Others strongly opposed such sentiment, arguing the legislation would trigger only more lawlessness.[125] The difference between supporters of and opponents to the legislation, in general, seems to be in regard to the goal sought to be achieved. Opponents viewed pacifying rioters by the passing of legislation as Congress opening itself up to more and more demands from the lawless, whereas supporters felt such measures were overdue and rioters deserved to have demands met.[126]

As adjudged from transcripts of House and Senate debates, the housing section was not the most prominent provision in the anti-riot legislation. In fact, Title VIII of the act—the open housing provision—was never discussed in Senate Report No. 721, set forth as part of the legislative history.[127] The report does, however, state the purpose of the legislation: "To meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights. The areas of protected activity are specifically de-

122. Debra L. Alligood, Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 UCLA L. REV. 199, 209 n.36 (1992).

123. 114 CONG. REC. 9583 (1968).

124. *Id.* at 9554-9583.

125. *Id.* at 9574. As Rep. Fisher stated:

> It has been said that this legislation will ease racial tensions, that it will vindicate the cause served by the late Martin Luther King. . . . This is the sort of legislation which will aggravate and promote discord, even as prior civil rights legislation enacted by the Congress has triggered more and more racial violence, arson, vandalism, and riots.

Id.

The sentiment of a supporter is represented by Rep. Cohelan:

> These [rioters] are people who have listened to the promises of better jobs, better housing, better schools. Their frustration, their alienation from the mainstream, is at the root of their behavior. Our job is to bridge the abyss to bring the reality to the promise.

Id. at 9577.

126. *See generally* 114 CONG. REC. at 9554-83 (portion of the debate).

127. S. Rep. No. 721, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837.

scribed."[128] That list of specified activities is quite lengthy, but receiving equal treatment in housing is not included.[129]

On the floor of the House, discussion of the open housing section focused on limited topics. First, both supporters and opponents were concerned that the Rules Committee, by allowing only one hour of debate and prohibiting amendments, forced representatives' hands on a difficult issue.[130] Opponents pointed to the current national turmoil and urged colleagues not to be persuaded to pacify rioters without further discussion.[131] Supporters argued that legislation on the matter, including the open housing issue, was past due.[132] Second, supporters reminded the House that 22 states, representing roughly 60 percent of the United States' population, already had their own open housing laws.[133] Finally, some were concerned with the property rights of landowners and felt the open housing provision would reap more dissension because it would force landowners to do with their property as they did not desire to do.[134]

128. *Id.* at 1838.

129. The list specifically reads:

> They include voting and activities related to voting; enrolling in or attending public schools or public colleges; participating in or enjoying the benefits of services, programs, facilities, or activities of Federal, State, or local governments; enjoying employment, union membership, or the services of employment agencies; serving on juries; using vehicles, terminals, or facilities of common carriers; participating in programs or activities receiving Federal assistance, and enjoying the facilities of hotels, restaurants, and other public accommodations.

Id. at 1838-39.

130. 114 CONG. REC. 9576 (1968).

131. *Id.* at 9556-57, 9576.

132. *Id.* at 9577.

133. *Id.* at 9554, 9565.

134. *Id.* at 9574. Rep. Cohelan's comments illustrate both the rebuttal to the property rights argument and the belief that such legislation was past due to address the needs of the oppressed minority:

> Open housing is, of course, the most pervasive and controversial part of the measure. Simply passing an open housing law will not bring an end of the ghetto—but it will mean that those who have the means and the desire to leave the ghetto will not be deprived of the chance to do so because of their race, religion, or national ancestry. And it will mean that minority citizens will no longer legally have their dignity affronted by the denial of housing for discriminatory reasons.
>
> Federal open housing is not as some have called it, "forced housing." No one is forced to rent or sell to any one. The law simply forbids the color or religion of the prospective buyer or renter from being a factor in the sale or rental.
>
> Real property rights have never been absolute. From the old English common law to the modern zoning ordinances, sale and use of land has always been regulated to meet social goals. Similarly 22 States and 96 localities have enacted open housing laws in the effort to attain the social goal of equal access to housing.

114 CONG. REC. at 9577.

Comments on the Senate floor paralleled those in the House of Representatives.[135]

Title VIII did not protect as many categories as the current FHA does. In 1968, Title VIII protected only race, color, religion, and national origin. Congress expanded this list of protected categories in housing discrimination in 1974 by adding "sex."[136] As in 1968, discussion on the amendment was insignificant in comparison to the amount of debate on the larger provisions in the same bill.[137] In fact, in the Senate, the amendment prohibiting sex discrimination received only a small, yet favorable, comment.[138]

The Fair Housing Amendments Act of 1988 added still more protections against discrimination in housing.[139] This time, however, the FHA received the full focus of the debate, rather than being lost as part of a larger bill and inadequately discussed. The purposes of the act were to "provide an effective enforcement system to make [equality in housing] a reality[,] . . . [and to] extend [the principal of] equal housing opportunity to handicapped persons . . . [and] to families with children."[140]

Though the debates concentrated on the new amendments, Representatives in the House emphasized racial discrimination and the fact that inequality in housing persisted despite twenty years of federal prohibition. The work of Dr. King was referred to several times,[141] and statistics showing pervasive racial discrimination were read into the Record.[142] For example, House Report No. 100-711 reads: "Twenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive."[143]

135. *Id.* at 5986, 5988, 5991 (discussing property rights concerns and sense that the legislation would prevent rioting though this debate occurred prior to Dr. King's assassination). *See generally id.* at 5986-92 (transcript of Senate debate and vote in its entirety).

136. The larger legislation's overall purpose is laid out in the Housing and Community Development Act of 1974. S. Rep. No. 693, 93rd Cong., 2d Sess. (1974), *reported in* 1974 U.S.C.C.A.N. 4273. The bill is an omnibus bill of 8 chapters covering a broad range of Federal housing and urban development programs." *Id.* at 4273.

137. *See generally* 120 CONG. REC. 6172-6216 (1974) (portion of debate).

138. 120 CONG. REC. 6146 (1974).

139. H.R. REP. No. 711, 100th Cong., 2d Sess., at 13 (1988), *reported in* 1988 U.S.C.C.A.N. 2173, 2174.

140. *Id.*

141. 134 CONG. REC. H4610, H4604, H4605 (daily ed. June 22, 1988).

142. *Id.* at H4612, H4609.

143. H.R. REP. No. 711, *supra* note 123, at 15, *reprinted in* 1988 U.S.C.C.A.N. at 2176. The passage continues:

> The Department of Housing and Urban Development estiates [sic] that 2 million instances of housing discrimination occur each year. In the most recent national study of housing discrimination, HUD concluded that a black person who visits 4 agents can expect to encounter at least one instance of discrimination 72 percent

Today, the declared policy of the United States is "to provide, within constitutional limitations, for fair housing throughout the United States."[144] Section 3604 of the Fair Housing Act[145] prohibits discrimination in selling, renting or refusing to negotiate for sale or rental a dwelling on the basis of race, color, religion, sex, familial status, national origin or handicap.[146]

B. The State Approach

When the federal government enacted the FHA in 1968, twenty-two states already had their own open housing statutes.[147] Today, almost all states have such anti-discrimination protections for their citizens.[148] In fact, only one state, Mississippi, appears to lack them.[149]

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of the time for rentals and 48 percent of the time for sales. . . . Recent regional studies including using testers, confirm that discrimination continues. . . .

Professor Douglas Massey of the University of Chicago recently examined residential segregation in 60 metropolitan areas, and found that blacks continue to experience very high levels of segregation.

Id. at 15-16, *reprinted in* 1988 U.S.C.C.A.N.

144. 42 U.S.C. § 3601 (1994). *See also* Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc., 422 F. Supp. 1071, 1075 (D.N.J. 1976) (discussing congressional intent in enacting FHA); Zuch v. Hussey, 394 F. Supp. 1028, 1046 (E.D. Mich. 1975) (discussing purpose of FHA).

145. Section 3604 provides in pertinent part:

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604 (1994).

146. 42 U.S.C. § 3604(a), 3604(f)(1) (1994). Because it is difficult to imagine a situation where a landlord would discriminate against a prospective buyer or tenant because of a handicap—and then defend on religious grounds—this section will not be considered in Part III.

147. *See supra* note 13.

148. State fair housing statutes are: ALA. CODE § 24-8-4 (1992); ALASKA STAT. § 18.80.240 (1994); ARIZ. REV. STAT. ANN. § 41-1491.14 (1992); ARK. CODE ANN. § 16-123-203 (Michie 1995); CAL. GOV'T CODE § 12955 (West 1994); COLO. REV. STAT. § 24-34-502 (1991); CONN. GEN. STAT. § 46a-64c (1995); DEL. CODE ANN. tit. 6, § 4601 (1993);

Unlike state free exercise clauses, state housing discrimination laws do not vary significantly. However, they were all adopted at different times and were amended to add new categories of protection at different rates.[150]

Alaska adopted its open housing law[151] in 1965[152] to prohibit race and religious discrimination and did not amend the law until 1972 when the legislature added "sex" to the list of protected classes.[153] Three years later, the legislature added "marital status," "changes in marital status," and "pregnancy."[154] Finally, in 1987, the legislature prohibited discrimination on the basis of disability.[155]

DEL. CODE ANN. tit. 25, § 6503 (1989); FLA. STAT. ch. 760.23 (1994 & Supp. 1996); GA. CODE ANN. § 8-3-202 (1989); HAW. REV. STAT. § 368-1 (1993); IDAHO CODE § 67-5909(7) (1995); ILL. ANN. STAT., ch 775, act 5 section 3-102 (Smith-Hurd 1993); IND. CODE ANN. § 22-9.5-5-1 (Burns 1994); IOWA CODE § 216.5 (1994); KAN. STAT. ANN. 44-1001 et seq. (1993); KY. REV. STAT. ANN. § 344.360 (Baldwin 1993); LA. REV. STAT. ANN. § 51:2606 (West 1996); ME. REV. STAT. ANN. tit. 5, § 4582 (West 1994 & Supp. 1995); MD. ANN. CODE art. 49B, § 22 (1994); MASS. ANN. LAWS ch. 151B, § 4(6) (Law. Co-op. 1982); MICH. COMP. LAWS ANN. § 37.2502 (West Supp. 1996); MINN. STAT. § 363.03 (1995); MO. REV. STAT. § 213.040 (1994); MONT. CODE ANN. § 49-2-305 (1994 & Supp. 1996); NEB. REV. STAT. § 20-318 (1991); NEV. REV. STAT. ANN. § 118.100 (Michie 1993); N.H. REV. STAT. ANN. § 354-A:8 (1995); N.J. REV. STAT. § 10:5-12 (1993); N.M. STAT. ANN. § 28-1-7 (Michie 1992); N.Y. CIV. RIGHTS LAW § 18-c (McKinney 1992); N.Y. EXEC. LAW § 291, 296 (McKinney 1993); N.C. GEN. STAT. § 41A-4 (1990); N.D. CENT. CODE § 14-02.4-01 (1993); OHIO REV. CODE ANN. § 4112.02 (Anderson 1994); OKLA. STAT. tit. 25, § 1452 (1994 & Supp. 1996); OR. REV. STAT. § 659.033 (1989); 43 PA. CONS. STAT. § 955 (1994); R.I. GEN. LAWS § 34-37-4 (1994 & Supp. 1996); S.C. CODE ANN. § 31-21-40 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 20-13-20 (1995); TENN. CODE ANN. § 4-21-601 (1991); TEX. PROP. CODE ANN. § 301.021 (West 1995); UTAH CODE ANN. § 13-7-1 (1996); VT. STAT. ANN. tit. 9, § 4503 (1993); VA. CODE ANN. § 36-96.1 (Michie 1990); WASH. REV. CODE § 49.60.222 (1990); W. VA. CODE § 5-11A-5 (1994); WIS. STAT. ANN. § 101.22 (Supp. 1995); WYO. STAT. § 6-9-102 (1995).

149. Mississippi does, however, prohibit discrimination in housing receiving public funding. MISS. CODE ANN. § 43-33-723 (1993).

150. As in Part I, an analysis of each state's open housing law is not feasible. Only the statutes of Alaska, California, Massachusetts and Minnesota will be addressed.

151. ALASKA STAT. § 18.80.240 (1994).

152. 1965 Alaska Sess. Laws ch. 117, § 6.

153. 1972 Alaska Sess. Laws ch. 42, § 8.

154. 1975 Alaska Sess. Laws ch. 104, § 11.

155. 1987 Alaska Sess. Laws ch. 69, § 11. Section 18.80.240 now reads in pertinent part:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property
>
> (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only . . . .

ALASKA STAT. §§ 8.80.240 to 18.80.240(1) (1994).

The California Legislature acted earlier than Alaska in adopting then Health & Safety Code section 35720 in 1959.[156] Although section 35720 prohibited race and religious discrimination, it applied only to publicly assisted housing.[157] Four years later, the legislature amended the provision to apply to "all housing rented or sold by business establishments under the Unruh Civil Rights Act,"[158] because the State found that over 2.5 million of its citizens—non-whites and whites with Spanish surnames—were suffering discrimination in obtaining housing.[159] In 1975, the legislature added gender and marital status protections.[160]

Minnesota adopted an open housing law by amendment in 1961, which prohibited race discrimination.[161] The order of amendments then parallels those of the prior two states: "sex" was added in 1969,[162] "marital status" in 1973[163] and "familial status" in 1980.[164]

Massachusetts, on the other hand, is the most progressive of the four states. The Massachusetts legislature enacted the state's open housing law eleven years before the federal government succeeded in passing the FHA. In 1957, the legislature added subsection six to an existing provision.[165] Massachusetts, however, lagged behind Minne-

156. 1959 Cal. Stat. ch. 1681, §1. *See* Department of Continuing Education of the Bar of the University of California Extension, *Selected 1959 Code Legislation* 34 CAL. ST. B.J. 581, 700-01 (1959) (discussion of the proposed bill).

157. Department of Continuing Education, *supra* note 156, at 700.

158. Committee on Continuing Education of the Bar, *Selected 1963 Legislation*, 39 CAL. ST. B.J. 609, 721 (1963).

159. *Id.* at 719.

160. Senate Final History, 1975-76 Reg. Sess. at 418. Today, the statute reads, in pertinent part:

> [U]nlawful practices.
>
> It shall be unlawful:
>
> (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person. . . .

CAL. GOV'T CODE § 12955(a) (Supp. 1996).

161. 1961 Minn. Laws ch. 428, § 5.

162. 1969 Minn. Laws ch. 975.

163. 1973 Minn. Laws ch. 729, § 3.

164. 1980 Minn. Laws ch. 531. The statute, in pertinent part, now reads:

> It is an unfair discriminatory practice:
>
> (1) For an owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease any real property, or any agent of any of these:
>
> (a) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status . . . .

MINN. STAT. ANN. § 363.03 Subd. 2 to 363.03 Subd. 2(1)(a) (West Supp 1996).

165. 1957 Mass. Acts ch. 426, § 2.

sota in adding gender protections. It did not include "sex," "age," and "ancestry" until 1971.[166] The legislature again amended subsection six in 1973 to add "marital status."[167]

Though each state has an open housing law with the same "bare bones" protections as enumerated above—race, religion, sex, and marital status—they differ in including additional protections. Alaska's law also prohibits discriminating on the basis of pregnancy or changes in marital status.[168] Minnesota adds "status with regard to public assistance" and familial status.[169] Massachusetts includes protection for veterans, the blind and those with guide dogs.[170] California has not expanded its law beyond those categories listed above.

None of the four states has listed sexual orientation or sexual preference in their open housing provisions. Nor has the federal government added such protection. However, it is possible for a homosexual couple, refused housing because of their sexual preference, to bring a housing discrimination case by alleging discrimination on the basis of sex or marital status. The couple could argue that if one of

166. 1971 Mass. Acts ch. 661.

167. 1973 Mass. Laws ch. 187, §§ 1-3. The law now reads in pertinent part:

It shall be an unlawful practice:

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person:—(a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, age, ancestry or marital status of such person or persons or because such person is a veteran or a member of the armed forces, or because such person is blind; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, age, ancestry or marital status or because such a person is a veteran or a member of the armed forces or because such person is blind in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such person possesses a trained dog guide as a consequence of blindness; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, age, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty years.

MASS. GEN. L. ANN. ch. 151B, § 4(6) (West 1982).

168. Alaska Stat. section 18.80.240(1) (1994).

169. MINN. STAT. ANN. section 363.03 subd. 2(1)(a) (West Supp. 1996).

170. MASS. GEN. L. ANN. ch. 1518, section 4(6) (West 1982).

the pair were a member of the opposite sex and/or if the couple was then married, the landowner would not object to their tenancy.

To summarize, each of the four states protects the basic four categories—race, religion, sex and marital status—and each state adopted them by amendment in the same order, though at different times. The same is true in the federal system of the FHA which added categories in the same order and protects the same categories with the exception of using "familial status" in the place of the states' "marital status."[171]

III. "WITH LIBERTY AND JUSTICE FOR ALL": Free Exercise Versus Discrimination Statutes

Both the history of the First Amendment and the history of the Fair Housing Act illustrate the importance Americans place upon both the free exercise of religion and upon eradicating discrimination in our society. But a difference of opinion arises when the two values are opposed to each other, and it seems necessary to make a difficult decision between the two. Though the conclusion of this Note suggests such a choice is avoidable, courts faced with cases of conflict have essentially balanced the two interests and decided which of the two prevails, in accordance with history and case law.

A. The Cases

The facts of the following cases are similar. Typically, a landlord refuses to rent to an unmarried cohabitating couple and, in doing so, violates a state housing law prohibiting discrimination on the basis of marital status. The landlord then defends himself by arguing his religious convictions dictate against renting to such a couple because their act of living together and likely sexual relations outside marriage, is considered sinful. The landlord seeks a free exercise-based exemption to the state law.

In his treatise, Lawrence Tribe summarized the necessary elements a claimant must show to obtain such an exemption.[172] This test applies only in states which apply the strictest standard of scrutiny, the compelling governmental interest test, to cases of infringement of free exercise rights. The claimant must first prove a sincerely held religious belief and then second, must prove that the state law substantially burdens his religious exercise.[173] Only after the claimant satisfies those two elements does the burden shift to the government to show that the law pursues an "unusually important governmental

171. 42 U.S.C. § 3604 (1994).
172. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1242 (2d ed. 1988).
173. *Id.*

goal" and that an exemption to the landlord would "substantially hinder the fulfillment of the goal."[174]

Under strict scrutiny, it is more difficult for state governments to justify laws burdening a landlord's sincerely held religious beliefs; thus, the landlord is more likely to earn a reprieve from punishment under the open housing statute. The landlord needs to make a minimal showing and then the burden shifts to the state to justify the law by showing a compelling interest.

The supreme courts of Alaska,[175] California,[176] Massachusetts,[177] and Minnesota[178] have each decided a conflicts case in the last six years. All of these cases dealt with marital status discrimination in which landlords refused to rent to a couple because of their religious mores. Thus far, in attempting to balance the interests of discriminating landlords against the interests of injured tenants, the courts have evenly split over the question of whose rights prevail.

(1) Minnesota

Minnesota was the first to decide such a case in 1990. In *State v. French*, the Minnesota court faced a conflict between its marital status discrimination prohibition in its open housing law and the state's constitutional protection of free exercise.[179] An engaged couple wanted to live together prior to their wedding and pursued renting French's two bedroom house.[180] However, French, a member of the Evangelical Free Church, refused to rent to the couple because of his religious belief that sexual relations outside marriage is a sin.[181] Notwithstanding his reservations about sexual relations, he also believed that his renting to an unmarried cohabitating couple would be aiding the "appearance of evil," and thus, would be contrary to his religious beliefs.[182] The Minnesota Supreme Court resolved the case with its interpretation of the marital status discrimination statute, rather than by an analysis of the more interesting conflicts issue.[183]

174. *Id.*

175. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994).

176. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996). Prior to *Smith*, the California Supreme Court granted, then dismissed as improvidently granted, another case involving the same issue. Donahue v. Fair Employment and Housing Comm'n, 2 Cal. Rptr. 2d 32 (1991), *review granted*, 825 P.2d 766 (1992), *review dismissed as improvidently granted*, 23 Cal. Rptr. 2d 591 (1993) (depublished from official report).

177. Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).

178. State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

179. *Id.*

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 3-4.

183. 460 N.W.2d at 11.

The four to three majority initially assessed Minnesota's fair housing statute, and specifically, the legislature's intent in adding "marital status" protections to the law.[184] The Court found that the Minnesota legislature intended to protect the status of an individual, i.e. single, divorced, married, etc., but not the individual's relationship with a cohabitant.[185] Thus, the statute's marital status protections did not prohibit refusals to rent to unmarried cohabitating couples.[186] This statutory interpretation section was the only portion of the opinion to garner a decisive majority.

Three justices from the majority[187] turned to the religious exemption analysis and applied strict scrutiny. They accepted that the landlord's religious beliefs were sincerely held and were burdened by the marital status discrimination.[188] The opinion dismissed the argument that the commercial nature of the landlord's activities affected the analysis with respect to whether the law burdened the defendant's religious rights.[189] The justices stated:

> [The state argues] that [the landlord] gave up his constitutional rights "by entering the public marketplace." . . . It is unreasonably cynical to say that his choice is simple: that he need not rent at all. Economic necessity may require him to seek rental income and this may be as critical to him as the need for wage income . . . . On the other hand, what burden is imposed on [the tenant] to enable her to rent, but not live with her fiance on the premises?[190]

Having found the first two requirements met, the three justices balanced the free exercise rights infringed against the state's interest in eliminating marital status discrimination. Going to great lengths to emphasize the long history of religious freedom and deep historical roots in the protection of religious rights in both Minnesota and Wisconsin.[191], the three justices acknowledged that the Minnesota Constitution offers far more protection of religious freedom than the Federal Constitution.[192] Therefore, strict scrutiny would be applied.[193]

The three justices then noted numerous contexts in which unmarried couples living together do not receive the same treatment as do married couples,[194] such as in the areas of employment and health

184. *Id.* at 5-6.
185. *Id.* at 6.
186. *Id.* at 7.
187. The fourth majority vote concurred only with respect to part one of the opinion—the statutory interpretation section. *Id.* at 11.
188. 460 N.W.2d at 10.
189. *Id.* at 7-8.
190. *Id.*
191. *Id.* at 8-9.
192. *Id.* at 9.
193. 460 N.W.2d at 9.
194. *Id.* at 10.

insurance benefits.[195] Finding that the "state has failed to sustain its burden in demonstrating a sufficiently compelling interest," the three concluded that burdening the landlord's free exercise was not justified.[196]

The dissent, joined by three justices, disagreed with the majority on every major point. First, the dissent found that the marital status discrimination prohibition protects unmarried cohabitating couples.[197] They then responded to the majority application of the exemption analysis. The dissent agreed that the landlord's beliefs were sincerely held[198] but did not concur as strongly with the finding of a burden.[199] Though they eventually found a burden on the landlord's beliefs such that the initial two prerequisites to the exemption analysis were met,[200] they appeared to sympathize with the state's argument that the commercial nature of the landlord's activities affects the burden analysis.[201] According to the dissent, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[202] The dissent reasoned that any burden imposed on the landlord by the statute is lessened "because it occurred only when [the landlord] voluntarily entered into the rental marketplace . . . and thus subjecting himself to potentially burdensome regulations such as the Act's prohibition of marital status discrimination."[203] Finally, the dissent disagreed with the three justices from the majority, determining that the state has an overriding, compelling interest in enforcing the marital status discrimination prohibition.[204]

The balancing of interests did not decide the conflicts case in Minnesota. The landlord won the swing vote only on the statutory interpretation issue. Minnesota is the only state, of the four states, to determine that the marital status protection of its fair housing law does not extend to unmarried couples. Minnesota, therefore, is the first to effectively decide the conflicts issue conclusively, but without turning to constitutional analysis and the balancing of the competing interests. The statutory protections do not apply in this circumstance;

195. *Id.*
196. *Id.*
197. *Id.* at 12 (Popovich, J., dissenting).
198. 460 N.W.2d at 14 (Popovich, J., dissenting).
199. *Id.* at 14-15 (Popovich, J., dissenting).
200. *Id.*
201. *Id.* (Popovich, J., dissenting).
202. *Id.* at 14-15 (quoting United States v. Lee, 455 U.S. 252, 261 (1982)).
203. 460 N.W.2d at 15 (Popovich, J., dissenting).
204. *Id.* at 16 (Popovich, J., dissenting).

thus, Minnesota has crafted a bright line rule making it clear that its landlords, so long as the statute is unamended or reinterpreted by a newly constituted court, may freely discriminate on this basis.

(2) Massachusetts

In Massachusetts, the conflicts issue came up through the appellate courts on appeal from a summary judgment ruling in favor of the defendant landlords. The Massachusetts Supreme Court, in *Attorney General v. Desilets*,[205] determined that summary judgment was premature and remanded the case to the trial court to give the "[Commonwealth] a chance to demonstrate its compelling interest in the application of the [marital status discrimination] statute."[206]

In *Desilets*, the landlords were brothers who owned a four-unit apartment building and who refused to rent to an unmarried couple because of their Roman Catholic belief that to do so would be facilitating the commission of a sin.[207] Before turning to the free exercise exemption analysis, the court noted that the marital status prohibition applied to protect unmarried individuals seeking to rent an apartment for joint occupancy.[208] The parties did not dispute that the landlords' convictions were sincerely held and were burdened by the housing discrimination law. The court stated: "conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion."[209] The court determined that there are many ways in which the statute burdens the landlords' free exercise privileges by making religious exercise more difficult and costly. Specifically, the court observed that the "statute affirmatively obliges [landlords] to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation. Moreover, both their nonconformity to the law and any related publicity may stigmatize the [landlords] in the eyes of many . . . ."[210] The court further noted that the commercial context in which the violation occurred did not affect the substantial burden analysis; a burden could be imposed in a commercial or noncommercial setting.[211] Therefore, the court was unanimous as to the first two elements of the analysis.

The court was also unanimous on the question of the applicable standard of review—the strict scrutiny/compelling governmental interest standard. Noting the similarity between its own state constitutional Free Exercise Clause and that in the Federal Constitution, the

205. 636 N.E.2d 233 (Mass. 1994).
206. *Id.* at 241.
207. *Id.* at 234-35.
208. *Id.* at 235.
209. *Id.* at 237.
210. 636 N.E.2d at 237-38 (footnote omitted).
211. *Id.* at 238.

Massachusetts Supreme Judicial Court declined to apply *E.D. v. Smith*[212] and instead followed its own state constitutional precedent to apply strict scrutiny.

At the next phase of the exemption analysis, the unanimity of the court broke down with respect to the weighing of the competing interests. A four justice majority decided to leave the question of whether the state has a compelling interest in eradicating marital status discrimination in housing up to the trial court on remand. Nevertheless, the Massachusetts Supreme Court hinted that it preferred the free exercise interest. First, the court separated marital status from other protected categories and from preventing discrimination as a whole. It then declared that marital status was not as significant a state concern as discrimination based on other categories. Unlike the other enumerated categories (sex, race, color, creed and national origin), marital status is not guaranteed equality under the law in the Massachusetts Declaration of Rights.[213]

The majority explained that it would not be making the determination that a compelling interest justified the infringement of free exercise in order to establish an easily applied bright line rule for all circumstances.[214] Rather, it considered the protection of free exercise interests to be of such importance that the lower Massachusetts courts would address all conflicts cases in which a religious defendant sought a religious exemption on a case-by-case basis.[215] The Massachusetts Supreme Judicial Court, however, instructed the lower court that, in determining if the state has a compelling governmental interest in the instant case, it is to look at the state's interest in eliminating marital status discrimination in housing both in the state as a whole and in the specific area in which the violation occurred.[216] Thus, the concern is with the residential rental business, not participation in formal religious activity. Finally, the following quote further indicates the Massachusetts Supreme Court's leaning toward protecting free exercise interests:

> Without supporting facts in the record or in legislative findings, we are unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the State has such a substantial interest in eliminating that form of housing discrimination that, on a balancing test, the substantial burden on the defendants' free exercise of religion must be disregarded.[217]

212. 494 U.S. 872 (1990).
213. *Desilets*, 636 N.E.2d at 239-40.
214. *Id.* at 240.
215. *Id.*
216. *Id.* at 241.
217. *Id.* at 240.

The concurring opinion suggested that, according to one justice, obtaining an exemption should be even easier than the majority indicated. Article two of the Massachusetts Declaration of Rights provides:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[218]

Though the majority felt that the section provides no more protection than article forty-six, section one of the state constitution,[219] the concurrence opined that the article should be applied and analyzed first.[220] The concurrence suggested remand to the trial court for a determination of whether the defendants' refusal to rent constituted a disturbance of the public peace.[221] If not, the court should grant an exemption. If the refusal constituted a disturbance of the peace, the court would balance the state's interest in public peace versus the article two rights that were infringed.[222]

The dissent was even more favorable to the defendant landlords because it found that summary judgment in favor of the landlords was acceptable.[223] The three dissenting justices determined that the state could not sustain its burden of proving a compelling interest in "ensuring the availability of rental housing for unmarried couples with a sexual relationship . . . ."[224]

Therefore, in Massachusetts, the housing discrimination law applies to protect unmarried cohabitating couples, however, landlords can obtain exemptions from the law based on their religious beliefs. Massachusetts' trial courts will determine whether, in the particular case, landlords' free exercise rights to practice their religion by living and doing business in accordance with their religious mores outweighs the state's interest in fulfilling the purpose for enacting marital status discrimination laws.

218. 636 N.E.2d at 241 n. 12. (quoting MASS. CONST. pt.1, art. III).
219. *Id.* at 243.
220. *Id.* (Liacos, J., concurring).
221. *Id.* at 246 (Liacos, J., concurring).
222. *Id.* (Liacos, J., concurring).
223. 636 N.E.2d at 246 (O'Connor, J., dissenting).
224. *Id.* at 246-47 (O'Connor, J., dissenting).

(3) California

Until the California Supreme Court's decision in *Smith v. Fair Employment & Housing Commission*,[225] (hereinafter *Smith v. FEHC*) California appeared to protect free exercise interests in spite of marital status discrimination prohibitions. In a depublished California opinion, *Donahue v. Fair Employment & Housing Commission*,[226] (hereinafter *Donahue*) the landlords refused to rent a unit in their five-unit apartment building to an unmarried cohabitating couple. As members of the Roman Catholic Church, they believed that fornication, and facilitating fornication by aiding the couple in living together, were sins.[227] Like the Minnesota Supreme Court, the California Court of Appeal decided for the landlord.[228] Though refusal to rent on the basis of the prospective tenants' marital status violated California's fair housing law, the landlord was entitled to an exemption from the law because complying with it conflicted with his religious belief and infringed upon his constitutional free exercise rights.[229]

The *Donahue* court explained that California's constitutional free exercise rights offered broader guarantees than the Federal Constitution; thus, it applied the compelling state interest standard[230] despite the U.S. Supreme Court's decision in *E.D. v. Smith*.[231] The court then determined that the state's interest in protecting such couples from discrimination in housing was not compelling.[232] Focusing on a "hierarchy" of protected categories, the court found that marital status, as opposed to race, did not deserve as much protection against discrimination.[233] The court also reasoned that while cohabitation is becoming more and more the norm, California has not promoted the practice in adopting it as a matter of government policy.[234]

Another California Court of Appeal reached a conclusion similar to that of the *Donahue* court in *Smith v. FEHC*.[235] A landlord, who rented units in two duplexes, refused housing to an unmarried couple. As was her practice, she informed the tenants that she preferred to

225. 913 P.2d 909 (Cal. 1996).

226. 2 Cal. Rptr. 2d 32 (1991), *review granted*, 825 P.2d 766 (1992), *review dismissed as improvidently granted*, 32 Cal. Rptr. 2d 591 (1993) (depublished from official reporter).

227. 2 Cal. Rptr. 2d at 33 n.1.

228. *Id.* at 46.

229. *Id.*

230. *Id.* at 40.

231. 494 U.S. 872 (1990).

232. *Donahue*, 2 Cal Rptr. 2d at 46.

233. *Id.* at 44.

234. *Id.* at 45.

235. 30 Cal. Rptr. 2d 395, *rev. granted*, 880 P.2d 111 (Cal. 1994), *aff'd in part., rev'd in part*, 12 Cal.4th 1143, 913 P.2d 909 (Cal. 1996).

rent to married couples because of her religious belief as a member of the Bidwell Presbyterian Church, that sexual relations outside of marriage was a sin.[236]

The court applied both the *E.D. v. Smith* federal analysis[237] and a state constitutional analysis and reached the same conclusion under each. Had the state law prohibiting marital status discrimination in housing[238] burdened only the landlord's free exercise rights, under *E.D. v. Smith*, the compelling interest standard would not have applied and the court's decision would have favored the tenants. However, the California Court of Appeal held that the landlord's free speech rights were also burdened by the law,[239] thus bringing the case within *E.D. v. Smith*'s "hybrid" situation,[240] which required the state to demonstrate that eliminating marital status discrimination was compelling and therefore justified infringement of the landlord's free exercise and free speech rights.

The court also addressed the conflict under a California constitutional analysis. Determining that the state constitution grants broader religious protections than does the federal constitution, the court found that a compelling interest standard is always implicated when free exercise rights are threatened in California—even if it is the only right implicated by the conflicting law.[241]

The court then concluded that eradicating marital status discrimination in the housing area did not constitute a compelling governmental interest.[242] In evaluating the several types of discrimination prohibited by the same law, the court found that, though the language of the statute and the legislative history did not indicate that different grounds of discrimination were to be arranged in a particular order of importance, the different grounds were not intended to be treated as equal.[243] Marital status discrimination does not command the same high level of protection that race discrimination demands.[244]

Therefore, until 1996, strict scrutiny was warranted under a California constitutional analysis and the state's interest in protecting couples against marital status discrimination was not compelling

236. 30 Cal. Rptr. 2d at 397.

237. *Id.* at 399-400.

238. CAL. GOV'T CODE § 12955 (West Supp. 1996).

239. 30 Cal. Rptr. 2d at 40. Smith had been ordered to post a notice in her rented apartments stating that she had been found guilty of discrimination on the basis of marital status. *Id.*

240. *Id.*

241. *Id.* at 408-09.

242. *Id.* at 409-10. Only the specific category of marital status discrimination was the focus of the inquiry—not the overall housing discrimination law. *Id.* at 404.

243. 30 Cal. Rptr. 2d at 404.

244. *Id.*

enough to overcome the burdening of free exercise rights. It appeared the landlord qualified for a religious exemption from the housing discrimination law in all circumstances. However, the California Supreme Court granted review of *Smith v. FEHC*[245] and then reversed the pro-landlord trend.[246]

In the California Supreme Court's *Smith v. FEHC* plurality decision, the court first affirmed the holdings of lower courts that the marital status discrimination statute indeed applied to prohibit discrimination against unmarried couples in rental housing.[247] The court next turned to the more interesting question: whether the elderly widow landlord was entitled to a religious exemption from the law. The court divided its analysis into three sections, each dealing with a different source for free exercise exemption analysis: *E.D. v. Smith*;[248] the Religious Freedom Restoration Act (RFRA),[249] and the California Constitution.[250] Under the first, the court noted that the *E.D. v. Smith* decision determined that an exemption was not available to a valid law of neutral and general applicability.[251] This flat rule leaves necessary only the determination of whether the marital status prohibition was such a law. The California Supreme Court concluded that the housing law, California Government Code section 12955, prohibited discrimination regardless of the motivation—religious or otherwise—and was therefore neutral and generally applicable.[252] Therefore, section 12955 did not violate the free exercise clause.[253]

The court then turned to RFRA which restores the *Sherbert*[254] and *Yoder*[255] standards of scrutiny. Under RFRA, the traditional exemption analysis is conducted and the compelling governmental interest standard is only applied after two prerequisites are met. First, the court found the landlord's beliefs to be sincerely held.[256] The landlord believed she would not be reunited with her deceased husband in the afterlife if she rented to the unmarried couple.[257] The plurality then addressed whether the landlord's religious beliefs were substantially burdened by the discrimination statute. It is at this point that the Cal-

245. 880 P.2d 111 (1994).
246. 913 P.2d 909 (Cal. 1996).
247. *Id.* at 918.
248. *Id.* at 919-21.
249. *Id.* at 921-29.
250. 913 P.2d 909 at 929-31.
251. *Id.* at 919.
252. *Id.*
253. *Id.*
254. Sherbert v. Verner, 374 U.S. 398 (1963).
255. Wisconsin v. Yoder, 406 U.S. 205 (1972).
256. 913 P.2d at 923.
257. *Id.* at 912.

ifornia court differs from the analyses of other state supreme courts, because it determined the case by finding the landlord was not substantially burdened.[258]

The plurality struggled with crafting a test for substantial burden. The opinion identified three factors to consider in making the substantial burden determination. First, if the party seeking a religious exemption can voluntarily avoid the conflict without violating her religious beliefs, the law does not substantially burden her.[259] The court said that if Mrs. Smith, the landlord, "does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, [she can] avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments."[260] The plurality also noted that her religion did not compel her to rent apartments.

Second, economic costs incurred because of the law conflicting with religious beliefs are not enough to render a burden substantial.[261] In this case, expenses would presumably arise from Mrs. Smith selling her rental units to avoid the ramifications of the law conflicting with her beliefs. Finally, if accommodation of the religious beliefs would impact third parties—here, the tenants—a burden is not substantial.[262] The court stated that the above three elements did not of themselves comprise a substantial burden test, but were factors to consider.[263] In the instant case, the court applied the three factors and found the required burden lacking; thus, the court did not determine whether the government demonstrated a compelling governmental interest in prohibiting marital status discrimination or that the law represented the least restrictive means to accomplishing the legislative purpose. Said the court, "In short, were we to grant the requested accommodation, Smith would have more freedom and greater protection for her own rights and interests, while [the tenants] would have less freedom and less protection."[264]

The court then turned to the final, state constitutional analysis, and utilizing some interesting twists and turns of logic, determined that the state constitution also did not protect Mrs. Smith. The plurality initially declined to pinpoint the level of free exercise protection granted by the California Constitution. It noted that some past free exercise cases were decided under an analysis similar to pre-*E.D. v.*

258. *Id.* at 923-29.
259. *Id.* at 925-26.
260. *Id.* at 925.
261. 913 P.2d at 926-27.
262. *Id.* at 928.
263. *Id.* at 926-29.
264. *Id.* at 928.

Smith cases—utilizing the strict scrutiny standard,[265] but also observed that older cases "suggest an approach closer to that of . . . [*E.D. v. Smith*]."[266] The court then stated that under either approach, given the analyses under *E.D. v. Smith* and RFRA discussed previously, Smith loses.[267] Under the former analysis, the housing discrimination law is neutral and generally applicable and therefore bars the landlord from obtaining an exemption. Under RFRA, the strict scrutiny analysis is applied, but because the California Supreme Court had already determined that the landlord's case for an exemption failed to satisfy the burden element, it reasoned that an exemption could not be obtained under a California constitutional analysis utilizing strict scrutiny.

However, it is settled law that state constitutions may provide greater free exercise protections than are guaranteed under the Federal Constitution. The fact that Smith loses under *E.D. v. Smith* and RFRA should not then end the inquiry. Yet, the court declined to assess whether California offers broader protections than does the Federal Constitution, saying that "[t]hese important questions should await a case in which their resolution affects the outcome."[268] So, it is difficult to assess under which standard cases involving California's free exercise clause should be analyzed. Further, the court, in a footnote, leaves open the question whether the California constitutional reference to "liberty of conscience" provides extended free exercise protections.[269]

The plurality opinion was joined by three justices. However, a concurring opinion provided the fourth vote for the tenants' victory. The concurring justice, however, determined that RFRA was an unconstitutional violation of the doctrine of separation of powers[270] and, therefore, afforded Mrs. Smith no measure of protection. Thus, under *E.D. v. Smith*, the tenants prevail.

Two dissenting opinions, together representing three votes, determined that Mrs. Smith's religious beliefs were substantially burdened.

265. *Id.* at 930-31.
266. 913 P.2d at 930.
267. *Id.* at 930-31.
268. *Id.* at 931.
269. *Id.* at 931 n.22. Not only did the plurality fail to determine the level of protections afforded under the "liberty of conscience" provision, it did not question whether the landlord's options—other than selling her business—which the Baxter dissent names, impose the requisite burden. *Id.* at 971-72 (Baxter, J., concurring and dissenting). By failing to assess the burden imposed should Smith continue to refuse to rent, suffering statutory penalties, or rent, suffering sin, guilt, etc., the plurality leaves open the question of whether non-economic detriment can be a constitutionally-significant burden in California, so as to necessitate continuing to the next phase of the exemption analysis, balancing free exercise against the discrimination law.
270. 913 P.2d at 937 (Mosk, J., concurring).

Justice Kennard observed that the plurality failed to discern a governing principle with respect to the substantial burden question.[271] Justice Kennard, however, found four elements which, if present, determine whether a substantial burden exists:

(1) a religious adherent engages in a particular activity; (2) a governmental command relating to the activity conflicts with the adherent's religious beliefs concerning the activity; (3) the conflict is irreconcilable (that is, to satisfy the governmental command the adherent must either abandon the activity or violate his or her religious beliefs); and (4) the detriment to the adherent from abandoning the activity creates substantial secular pressure on the adherent to violate his or her religious beliefs rather than abandon the activity.[272]

Kennard found all the above elements met and disputed the plurality's opinion that the fact that Smith's religion did not compel her to rent apartments was a factor in finding substantial burden lacking.[273] Rather, a burden exists because the discrimination law "conditions receipt of [a] . . . benefit [that is, the right to engage in the rental housing business] upon conduct proscribed by a religious faith, . . . thereby putting substantial pressure on [her] to modify [her] behavior and to violate [her] beliefs."[274] Further, Mrs. Smith was subject to civil penalties and a cease-and-desist order, which potentially could expose her to fines and imprisonment if she continued to refuse to rent to unmarried couples.[275]

Finally, Justice Kennard disputed each of the plurality's three factors of its substantial burden analysis. She was unpersuaded that the fact Smith can "redeploy her capital" should affect the analysis.[276] Nor did she believe the fact that a religious exemption would affect third parties—tenants—should be a factor. "The purpose of the substantial burden inquiry is to determine whether further judicial inquiry is warranted into the state's justifications for the burden it has imposed on an individual's exercise of religious beliefs"[277]—namely, to determine if balancing under the compelling governmental interest test is warranted. "To consider at . . . [this] stage . . . the third party impact of a hypothetical [religious] accommodation . . . subverts this purpose. . . . Using them to negate the substantial burden on Smith and thereby avoid reaching the compelling interest test results in a

271. *Id.* at 943 (Kennard, J., dissenting).

272. *Id.*

273. *Id.* at 945.

274. *Id.* at 944 (quoting Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 717-18 (1981)).

275. 913 P.2d at 945.

276. *Id.* at 945.

277. *Id.* at 948.

blind deference to state policy judgments infringing religious freedom."[278]

Justice Kennard further disputed the plurality's contention that the expense incurred because of the law—arising from its assumption (and *direction*) that she sell out of the business—is not enough to satisfy the burden requirement. Kennard stated that free exercise decisions "demonstrate that a conflict between government laws and an individual's religious beliefs substantially burdens the exercise of religion in cases where the believer cannot avoid the conflict except by abandoning participation in the activity that gives rise to the conflict."[279]

Kennard's dissent, therefore, found the burden element met, and turned to the question of the two showings the government must make to justify the law's burden—that the law serves a compelling interest and is the least restrictive means to accomplishing the government's purpose. She determined that it was "questionable" whether the government proved a compelling interest and noted that the government, interestingly, had sought to prove that all forms of discrimination—and discrimination as a whole—are "equally invidious" and "the state has an equally compelling interest in eliminating all of them."[280] Justice Kennard disputed this assertion, noting that there is no history of invidious discrimination against unmarried couples as there is with respect to race, gender, and ethnicity.[281] In the end, she declined to resolve whether eliminating marital status discrimination was a compelling governmental interest, because she found that the government failed to prove that the state could not accomplish its purposes by less restrictive means.[282] Because Justice Kennard determined that Smith was protected under RFRA, she did not need to proceed with a federal or state constitutional analysis.

Justice Baxter, joined by Chief Justice Lucas, also dissented. Unlike Justice Kennard, Justice Baxter would remand the case to the Fair Employment & Housing Commission, which first determined Smith impermissibly violated the housing discrimination law, because RFRA was not in effect at the time the Commission originally heard the case.[283] In proceeding to analyze the conflicts issue under RFRA, the dissent initially noted that Mrs. Smith had three options available to her: (1) rent to the couple and violate her beliefs; (2) refuse to rent, violate the law and, therefore, incur statutory penalties (which "include increasingly severe *criminal penalties* for continuing viola-

278. *Id.*
279. *Id.* at 949.
280. 913 P.2d at 951-52.
281. *Id.*
282. *Id.* at 954.
283. *Id.* at 958 (Baxter, J., dissenting).

tions"); or (3) get out of the rental business.[284] This observation is notable because Baxter sees more alternatives for Mrs. Smith—each of which present some degree of burden to her and should be considered under the burden analysis—while the lead opinion only considered redeployment of capital as an option imposing a burden on Mrs. Smith.[285] He observed that the plurality's result and reasoning is in concert with *E.D. v. Smith*—supposedly no longer the law, and not with RFRA. He noted that, like *E.D. v. Smith*, the lead opinion requires Smith to comply with laws that are "valid and neutral. . . [and of] general applicability," or to take her capital elsewhere.[286]

Baxter further argued that the fact that Smith's religion does not require that she rent apartments for a living is inapposite; her religion *does* compel her to refuse to rent to unmarried couples and *that* is where the conflict with the law arises. Indeed, the lead opinion focused on the commercial (and voluntary) nature of Mrs. Smith's activity; it emphasized the economic effects of the law on her, the effects of her actions on third parties (arising out of the commercial context of the exchange between the tenants and Smith), and the mobility of capital. Baxter, on the other hand, stated: "Although the extent of the 'economic' burden a challenged statute imposes on the believer is clearly a factor that can be weighed . . . it is not determinative of the question of 'substantial burden' where, as here, it can be shown that compliance with the law *conflicts* with the believer's fundamental religious beliefs."[287] In fact, he observed that the plurality's substantial burden factors represent considerations that would correctly be made under the compelling governmental interest and least restrictive means analyses. To illustrate, he quoted the majority's statement that granting a religious exemption would grant Mrs. Smith "more freedom and greater protection for her own rights . . . while [the tenants] would have less freedom and less protection."[288] He noted that consideration of that fact does not belong in the substantial burden analysis.

In finding the substantial burden requirement met, Baxter commended the observations of the lower court that Mrs. Smith could not "remain faithful to her religious convictions and beliefs and yet rent to unmarried couples. If faced with that choice, [Smith] testified her . . . rental units will 'stay vacant.' The Commission's order penalizes [Smith] for her religious belief . . . ."[289] Baxter then turned to the

284. *Id.* at 965.
285. *See* text accompanying note 260.
286. *Smith*, 913 P.2d at 965.
287. *Id.* at 968.
288. *Id.* at 968 (quoting lead opinion at 928).
289. *Id.* at 971 (quoting *Smith v. FEHC*, 30 Cal Rptr. 2d 395, *rev. granted*, 880 P.2d 111 (Cal. 1994), *aff'd in part, rev'd in part*, 12 Cal. 4th 1143, 913 P.2d 909 (Cal. 1996)).

compelling governmental interest question. He concluded that the proscribed grounds of discrimination in the law were not intended to be given equal emphasis: race discrimination, for example, commands strict scrutiny, but marital status does not.[290] Though Baxter implied that marital status protection was not a compelling state interest, he addressed the issue of least restrictive means.[291] Baxter felt that granting religious exemptions to the law would be neither administratively burdensome to the courts, nor economically detrimental to the housing market.[292] Baxter concluded that, considering the above, the state would bear a challenging burden of showing least restrictive means.

Finally, Baxter added a criticism of the lead opinion's overall analysis. He found fault with the plurality's failure to address the conflicts issue pursuant to the state constitution. States are bound to offer *at least* the level of protection afforded by the Federal Constitution, but, in their own constitutions, can guarantee further protections. Thus, when a person is not protected by the Federal Constitution, the analysis does not end. It must still be determined whether the person is aided by broader state guarantees. In Mrs. Smith's case, the plurality simply passed on the state constitutional issue by stating that, under whatever level of protection California offers, the state's free exercise protections had, until that time, never been greater than as guaranteed by *Sherbert* and, because Mrs. Smith loses under RFRA, she would necessarily lose under the state constitution. Baxter found fault with this analysis since Mrs. Smith's beliefs enjoy a measure of protection under the state constitution. Baxter agreed with the concurring opinion in a 1991 California case, *Sands v. Morongo Unified School District*, which stated that free exercise cases should first be addressed pursuant to state constitutional principles, because they are at least as expansive as the federal.[293]

Thus, a plurality of the Supreme Court of California found in favor of the tenants in this case. By determining that the discrimination law failed to burden the landlord's free exercise interest as a matter of law, balancing was not required. If the decision represents a bright line rule in favor of tenants, it also represents a 180-degree turn from the status of California law prior to the decision.

290. *Id.* at 972-73.

291. *Smith*, 913 P.2d at 974.

292. *Id.* at 974-75.

293. 809 P.2d 809, 835-36 (Cal. 1991) (Mosk, J., concurring), *cert. denied*, 112 S. Ct. 3026 (1992).

(4) Alaska

Like California, the Alaska Supreme Court found for the injured tenants. In *Swanner v. Anchorage Equal Rights Commission*,[294] the state challenged a landlord's policy against renting to unmarried couples under Alaska's housing discrimination law.[295] Swanner, a religious landlord, believed that living with the opposite sex while unmarried constituted a sin, even if the couple's relationship was nonsexual, because the living arrangement still suggested immorality.[296] Swanner claimed he was entitled to an exemption from the law under both the U.S. and Alaska Constitutions.

The court first determined that "marital status" protections are intended to benefit cohabitating couples.[297] Turning to federal free exercise jurisprudence, the Alaska court cited *E.D. v. Smith*'s holding that generally applicable and neutral laws did not require satisfaction of the strict scrutiny standard to justify burdening religious free exercise.[298] The *Swanner* court found that Alaska's housing discrimination law was facially neutral and generally applicable,[299] and that application of the compelling interest standard to balance the two interests was not warranted.[300] Further, because the landlord did not contend that any additional rights were burdened by the discrimination law, the *E.D. v. Smith* "hybrid" situation, and corresponding necessity to apply strict scrutiny, was not implicated.[301]

The analysis under the Alaska Constitution was not so simple. Alaskan precedent,[302] the court stated, requires application of the *Sherbert* strict scrutiny standard.[303] But before the case warrants such balancing, three requirements must be met. The religious landlord must show that: 1) a religion is involved; 2) the illegal conduct is religiously based; and 3) the landlord is sincere in his belief.[304] The court found that all three requirements were met in this case.[305]

294. 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994) (Thomas, J., dissenting).

295. ALASKA STAT. § 18.80.240 (1994).

296. *Swanner*, 874 P.2d at 277.

297. *Id.* at 278.

298. *Id.* at 279.

299. *Id.* at 280.

300. *Id.* The court also acknowledged the recent passage of the Religious Freedom Restoration Act and its purpose of restoring *Sherbert*'s compelling interest standard. However, the court then noted that an RFRA analysis was not necessary because the Alaska constitutional analysis required a *Sherbert* analysis and yielded the same results as *Smith*, without it. 874 P.2d at 280 n.9.

301. *Id.*

302. Frank v. State, 604 P.2d 1068 (Alaska 1979).

303. *Swanner*, 874 P.2d at 282.

304. *Frank*, 604 P.2d at 1071 (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16(1972)).

305. 874 P.2d at 281-82. Alaska does not have a substantial burden requirement.

The court next turned to the compelling government interest question. They conducted a unique analysis of the state's interest in protecting against marital status discrimination. Rather than simply determining, as some of the previous cases have, whether eliminating marital status discrimination is a compelling interest, the court posited that the real question is "whether that interest . . . will suffer if an exemption is granted to accommodate the religious practice at issue."[306] Alaska's definition of the strict scrutiny test is suspicious. It seems rather obvious that when two interests conflict and one must prevail over the other, the losing interest will suffer.

The court further confused the issue by finding the government has two interests: "a 'derivative' interest in ensuring access to housing for everyone, and a 'transactional' interest in preventing individual acts of discrimination based on irrelevant characteristics."[307] The derivative interest is ensuring equal access to housing. The transactional interest is preventing specific discriminatory acts based on "irrelevant characteristics."[308] In a case involving a derivative interest where the complaining party did not suffer in the end—i.e., found housing despite one discriminatory event—the court seemed to say it would be easy to grant an exemption because the derivative interest is maintained, and the overall governmental goal is undeterred. However, if the case involved a transactional interest and the infraction occurred because the law and that interest were directly violated, such an exemption would not be granted. That is, if the intent of the law is to prevent individual discriminatory incidents in the housing area, violations of the housing discrimination law would not be accepted even on religious grounds.[309] The court further noted that rental activity is commercial in nature and the landlord enters into the business voluntarily.[310] Therefore, according to the court, any burden on the landlord is self-imposed. Thus, Alaska provides less free exercise protection in voluntary commercial endeavors than for "directly religious activity."[311] Finding a transactional interest involved in this case, which would suffer if an exemption were granted, the court denied the exemption.[312]

Alaska has effectively determined that, under two very different analyses, no religious exemptions would be granted. On one level, the opinion in *Swanner* seemed to hold that a court has only to determine whether a derivative or transactional interest is at stake in a conflicts

306. *Id.* at 282 (quoting *Frank*, 604 P.2d at 1073).
307. *Id.*
308. *Id.*
309. *Id.* at 282-83.
310. 874 P.2d at 283.
311. *Id.*
312. *Id.* at 282-84.

case to decide whether a free exercise exemption is warranted. However, the Alaska Supreme Court clearly balanced free exercise against the discrimination law. Though the majority referred to the standard used in balancing as one requiring a "compelling government interest," they define that standard by stating that the religious interest fails (and the standard supposedly is met) if the discrimination interest would suffer as a result of granting exemptions to the law. Thus, with respect to the *Sherbert* test, it is doubtful that the standard being applied is truly the same high standard referred to in *Yoder*, *Desilets*, and *French*.

In his dissent, Chief Justice Moore argued there is no precedent for the derivative/transactional analysis[313] and undertook to balance the competing interests in the traditional manner using the *Sherbert* compelling government interest standard.[314] The Chief Justice found that the compelling interest standard applied if the category sought to be protected from discrimination was a historically disadvantaged group.[315] While race and gender would qualify, not all categories of discrimination are equally as "invidious."[316] Because there is no history in Alaska of unfair treatment on the basis of marital status, Moore concluded that the prohibition of marital status discrimination did not constitute a competing interest "of the highest order,"[317] warranting heightened scrutiny to protect that category. He further commented that a compelling government interest need be shown regardless of whether free exercise is burdened in a commercial setting.[318] Finally, the dissent concluded that an exemption was in order.[319]

B. The Analysis

All four state supreme court cases[320] share some similarities, but they also differ dramatically in terms of their analyses and their results. First, all of the cases determined whether their state's prohibition of marital status discrimination applied to protect unmarried cohabitating couples. The courts then turned to tests established pursuant to the federal or their respective state constitutions to determine whether a free exercise exemption should be granted to the religious landlord. Some states' analyses proceeded through all stages of the

313. *Id.* at 286-87 (Moore, C.J., dissenting).
314. *Id.* at 286.
315. 874 P.2d at 287.
316. *Id.* at 287-88.
317. *Id.* at 287.
318. *Id.* at 290.
319. *Id.* at 291.
320. In this subsection, the two California Court of Appeals cases are removed from the analysis, except where expressly noted.

tests, but other states did not find it necessary to tackle the final inquiry—the balancing step—because initial prerequisites were not met. Finally, the states' courts employed various reasoning to arrive at or explain their conclusions. Some strains of similarity can be found. This subsection will separate each step of the process to focus on areas of agreement among the states and areas of sharp dissention.

(1) Application of the Marital Status Statute to Unmarried Couples

All four state supreme courts began their analyses by determining whether refusing to rent to *unmarried* couples violated state marital status discrimination laws. Three states, Alaska, California, and Massachusetts, determined that their statutes were violated.[321] However, in Minnesota, the question was answered in the negative.[322] Though three justices from the majority and the dissent continued to address the exemption analysis, the majority holding established conclusively that religious landlords in Minnesota are free to refuse to rent to unmarried couples.

(2) The First Prerequisite in the Free Exercise Exemption Test—A Sincerely Held Belief

This requirement was a non-issue in all four high court cases. None of the state supreme courts questioned that the landlords' beliefs were anything but sincerely-held.

(3) The Second Prerequisite in the Free Exercise Exemption Test—A Substantial Burden

This requirement only entered into the analyses of three states since Alaska does not require that the landlord show a substantial burden. However, only in California was the issue dispositive.

Both the majority justices and the dissenters in Massachusetts found conclusively that the landlord's beliefs were substantially burdened by the discrimination prohibition.[323] Likewise, the three justices joining the second part of the Minnesota majority, discussing the exemption analysis in dicta, found a substantial burden.[324] And though the three Minnesota dissenters questioned the finding of a burden because the violations took place in a commercial context,[325]

321. *Swanner*, 874 P.2d at 278; Smith v. FEHC, 913 P.2d 909, 914 (Cal. 1996); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994).

322. State v. French, 460 N.W.2d 2, 6 (Minn. 1990).

323. *Desilets*, 636 N.E.2d at 237-38 (majority); *Id.* at 246 (dissent).

324. *French*, 460 N.W.2d at 9-10.

325. *Id.* at 14-15 (discussing burden requirement).

they said the landlord's beliefs were burdened and continued with their analysis.[326]

Only in California did the plurality opinion turn on the burden issue.[327] That state's supreme court determined that economic detriment as a result of the discrimination law—presumably incurred because the landlord would opt to sell out of the business rather than to sin or to suffer statutory penalties—does not satisfy the substantial burden requirement.[328] According to *Smith v. FEHC*, the religious landlord is not sufficiently burdened even though the regulatory law imposes financial costs on him. Further, the lead opinion reasoned that the landlord was not sufficiently burdened because excusing her violation of the law—by granting her an exemption—would affect third parties,[329] and she could voluntarily avoid the conflict with the law by selling her units and entering another business.[330]

Responding to the argument that the landlord can simply leave the rental business, the three justices on the majority of Minnesota's decision found the resulting economic burden significant.[331] They determined that the decision to sell out is no decision at all because the need for rental income may be just as great as the need for wage income.[332] Hence, if the landlord were to leave the business, the rental income would correspondingly cease, and a burden would be imposed.

The California court also fails to discuss noneconomic burdens, such as the resulting guilt, sin, or mental burden of believing that one is eternally damned by renting to unmarried couples *or* the statutory penalty if the law is violated.[333] However, the Massachusetts Supreme Court did address noneconomic burden. They found that the discrimination law made religious exercise more difficult, more costly, required landlords to enter into religiously undesirable contracts,

326. *Id.* at 15.

327. *See* Smith v. FEHC, 913 P.2d 909 (Cal. 1996). It is questionable whether the substantial burden analysis carried four votes. Only three joined the lead opinion. The fourth vote for the result concurred separately, determining RFRA was unconstitutional and, therefore, offered no measure of protection for Mrs. Smith. Since *E.D. v. Smith's* analysis does not have a substantial burden element, it is unclear whether the concurring vote joins in the lead opinion's burden analysis.

328. *Id.* at 929.

329. *Id.* at 925. The logical flaw is self-evident.

330. *Id.* at 929.

331. State v. French, 460 N.W.2d 2, 8 (Minn. 1990). This determination was included as part of the statutory interpretation, and arguably, has four votes—a majority.

332. *Id.*

333. One of the dissenting opinions, however, pointed out the error of addressing only one possible burden resulting from the conflict with the law—coercion to sell the business to avoid the conflict—without considering whether other options available to Mrs. Smith present a sufficient burden. The other options are: (1) renting to the couple and suffering sin and guilt; or (2) refusing to rent and incurring statutory penalties. Smith v. FEHC, 913 P.2d 909, 965 (Cal. 1996) (Baxter, J., dissenting).

penalized violations motivated by religious conduct, and stigmatized the landlords in the public eye for their religious practices.[334] In all these ways, the court found substantial burden.

Also, the California Supreme Court declines to determine whether a provision in the state's constitution referring to "liberty of conscience" provides more free exercise protections to the landlord seeking an exemption to the violated law.[335] Indeed, "liberty of conscience" seems to be exactly what all of the religious landlords in these cases are seeking, and the phrase reflects the type of burden Mrs. Smith tried to argue she would suffer by renting to unmarried couples.

The California analysis is interesting for another reason. Not only does the lead opinion fail to assess whether non-economic burdens can satisfy the requirement, but the entirety of the substantial burden inquiry fails to focus on the burden on Mrs. Smith's beliefs. Presumably, the substantial burden element tests whether a person's religious beliefs are so infringed that the state need justify the conflicting law; such an issue appears to focus on the individual in the context of her beliefs. The lead opinion, however, limits its substantial burden inquiry to three elements: (1) the voluntary, commercial nature of the landlord's activity; (2) the expense imposed by the law; and (3) the effects of exempting a person from the law. The first and second fail to focus on the individual or her beliefs and the last jumps the gun by assessing the end results of a balancing analysis prior to its application. More importantly, it too fails to focus on the landlord's beliefs.

In summary, the states are not only divided in terms of finding a substantial burden sufficient to satisfy this second exemption analysis prerequisite, but they are also divided in terms of the types of burden that will suffice. Massachusetts, in both the majority and dissenting opinions, conclusively found a burden and the majority even indicated that noneconomic burden satisfied the requirement. The California majority just as squarely found no burden and limited its analysis to financial detriment in a commercial setting. Finally, the three justices from Minnesota's lead opinion found a burden in dicta, as did the dissent which initially questioned whether the commercial context altered the analysis. One thing is clear after *Smith v. FEHC*, however: at least in California, the substantial burden question is no longer one to be passed over without considerable debate.

334. Attorney Gen. v. Desilets, 636 N.E.2d 233, 237-38 (Mass. 1994).
335. *Smith*, 913 P.2d at 931 n.22.

(4) The Balancing Test—Application of the Compelling Governmental Interest Standard

Only three of the four states ever actually balanced free exercise against the discrimination interest.[336] And in only two of those three states was the discussion dispositive of the case.[337] California determined that the landlord lost on the substantial burden issue, and therefore did not carry its analysis further. In Minnesota, a majority of four justices disposed of the case at the statutory interpretation level. Though three of those four justices did continue the analysis, their discussion in dicta was equally opposed by three dissenting justices.

Of those two state supreme court cases whose outcomes depended on the balancing analysis, one was decided in favor of the landlord[338] and the other in favor of the tenants.[339] Further, both cases had a clear majority.[340] The Alaska Supreme Court, per curiam, determined that its state had a "compelling interest" in eliminating marital status discrimination in housing, such that the landlord was not entitled to an exemption.[341] Only one dissenter disagreed.[342] Moreover, in Massachusetts, the court did not reach the balancing issue, but its guidelines to the lower court implied that the state had a very difficult showing to make in order to win[343] and hinted that such a high standard could not be satisfied. The dissent emphasized the free exercise interest even further by conclusively finding that the state did not have a case, and therefore, the landlord should prevail.[344] Thus, entirely different results were reached by large majorities in the two cases where the balancing issue was dispositive. The outcomes of future conflicts cases are therefore quite uncertain.

(5) The "Commerce" Argument

The states/tenants commonly argue that the landlord's beliefs cannot be found burdened, or that the landlord is not entitled to the

336. Alaska, Massachusetts, and Minnesota.

337. Alaska and Massachusetts.

338. Massachusetts.

339. Alaska.

340. Alaska: 6-1. Massachusetts: effectively unanimous with respect to reaching a pro-free exercise result. Both states disposing of their cases without balancing—California and Minnesota—had sharply split courts; each case was decided by a 4-3 vote.

341. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (holding the discrimination interest would "clearly 'suffer'" if an exemption were granted, thus satisfying Alaska's lenient "compelling interest" standard), *cert. denied*, 115 S. Ct. 460 (1994) (Thomas, J., dissenting).

342. *Id.* at 286 (Moore, C.J., dissenting).

343. Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

344. *Id.* at 246-47 (O'Conner, J., dissenting).

full measure of free exercise protection, because he has voluntarily entered into a commercial enterprise which is regulated by law. The court's acceptance or rejection of this argument, obviously, has corresponded with the outcome—pro-landlord or pro-tenant—reached.

The majorities in California and Alaska, as well as the minority in Minnesota, shared pro-tenant views and wrote of the commercial context of the landlords' activities as being relevant to the analysis of the case. Only in one of the three, Alaska, did the commerce circumstance warrant the state providing lesser religious freedom protections than provided for "directly religious activity."[345] In the other two states, the commercial nature of the rental business went to the substantial burden requirement.[346]

The Minnesota minority questioned whether a burden could properly be found when the landlord's activity was of a business nature, but it eventually found the substantial burden requirement met.[347] For California, however, the commerce argument went to the substantial burden requirement and the majority, finding no burden, decided the case at that phase.[348] The court observed that the landlord had voluntarily entered into the housing business, a commercial enterprise regulated by religion-neutral laws, including the discrimination law at issue.[349] Therefore, in the three opinions above, the commercial context of the landlord's violation was partially dispositive, at best, and worthy of discussion, at least.

On the other hand, the Minnesota and Massachusetts majorities, Alaska dissent, and one of the California dissents in favor of the religious landlords downplayed the commerce element. To the extent that they acknowledge that the commerce argument *may* play a role in

345. *Swanner*, 874 P.2d at 283.

346. Substantial burden is not a requirement in Alaska.

347. Minnesota *ex rel* Cooper v. French, 460 N.W.2d 2, 14-15 (Minn. 1990) (discussing the burden requirement).

348. Smith v. FEHC, 913 P.2d 909, 929 (Cal. 1996).

349. *Id.* at 928-29. The landlord was free to invest her capital in another business and presumably, therefore, incurred the burden on herself by remaining in the rental business. Also, the commercial context was further made a factor due to the court's inclusion of the effects on third parties on exempting the landlord's discrimination. The commercial aspects of the exchange between landlord and tenant are brought to the forefront of the inquiry. The court said, "[t]o say [the tenants] may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises . . . ." *Id.* at 928. In short, that the court views the commercial context as central to its analysis is revealed in the court's own summary of the essential facts guiding its determination. They are: "Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise . . . . The asserted burden is the result . . . of a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive. . . . [T]o grant the requested accommodation . . . would necessarily impair the rights and interests of third parties." *Id.* at 928-29.

the analysis, it is unclear at what stage of the process they would acknowledge and render relevant the business context in which the violation took place.

The Minnesota court addressed the commerce argument in the context of determining whether the anti-discrimination statute applied to unmarried couples. However, the extent to which the commerce contention fits into the court's determination that the statute did not apply to protect such couples is unclear. The state argued that the landlord "gave up his constitutional rights 'by entering the public marketplace.'"[350] But the court then uses "burden" language that, in the context of an exemption analysis, would indicate that the commerce contention is being rejected as applied to the substantial burden question. The court indicates that the landlord would be burdened by having to sell his business because of the discrimination statute, and then asks, "[W]hat burden is imposed on [the tenant] to enable her to rent, but not live with her fiancé on the premises?"[351] Thus, the Minnesota majority seems to reject the commerce argument, but whether the rejection is wholesale is unclear. Further, the discussion of the commerce context did not take place in the portion of the opinion one would expect—the exemption analysis.

While rejecting the consideration of the commerce element with respect to the substantial burden question, the Massachusetts court indicated that the trial court should consider it when balancing interests on remand.[352] Since both the majority and dissent were concerned with protecting religious freedom, the commerce element was one of few elements that the state would have in its favor to argue on remand.

However, the dissent in the Alaska opinion, *Swanner*, rejected the commerce contention in its entirety. Responding to the majority contention that the commercial context minimizes the constitutional protection afforded the landlord, the lone dissenter stated, "[No case] of which I am aware stands for the proposition that individuals . . . altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a commercial context."[353] He opined that the state would have to show a compelling interest, regardless of the context.[354]

350. *French*, 460 N.W.2d at 7-8.

351. *Id.* at 8.

352. Attorney Gen. v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994).

353. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 290 (Alaska 1994) (Moore, C.J., dissenting), *cert. denied*, 115 S. Ct. 460 (1994) (Thomas, J., dissenting).

354. *Id.*

Justice Kennard's dissent in *Smith v. FEHC* indicates an awareness that the commerce element guided the lead opinion's reasoning, but she does not refute the element as a consideration in the same direct manner as does the dissent in the Alaska case.[355] Responding, however, to the lead opinion's reasoning that the landlord is not burdened because her religious beliefs do not compel her to rent apartments, the dissent stated, "[The landlord's] beliefs do not compel participation in the [voluntary commercial] activity but *participation on the government's terms necessarily violates those beliefs.*"[356] Finally, the dissent disagreed with the plurality's personification of the landlord as a typical investor by observing, "Smith . . . is not a passive investor who receives investment income without personal effort. She earns her income by actively managing her rental property."[357] Therefore, rather than tackling the issue of whether the commerce element should be a factor in conflicts cases, both the plurality and dissent in California argued micro-factors[358] and landlord personification to determine whether the landlord is substantially burdened.

In general, judges rejected the commercial context argument, or minimized its effects, if they tended towards protecting the landlord's free exercise interests. And, on the other hand, decisions for the tenant and the discrimination interest included the commercial element in various parts of their reasoning.

(6) The Hierarchy of Discrimination Categories Argument

In all four cases discussed above, the courts conducted their analyses focusing only on marital status discrimination. The courts did not balance free exercise against discrimination as a whole.[359] However, several opinions and dissents discussed the argument that not all categories of discrimination protection—race, gender, marital status, etc.—should receive the same level of protection in the course of determining whether eradicating marital status discrimination was a compelling governmental interest. The courts noted that some categories, such as race, have been protected longer than others and have suffered long histories of invidious discrimination such that the eradi-

355. In fact, the lead opinion never explicitly stated that the commerce element governs—or is a factor—but rather, crafted three factors to determine the substantial burden question. It is readily apparent, however, that each of the three reflect that the commerce element is a primary consideration.

356. Smith v. FEHC, 913 P.2d 909, 945 (Cal. 1996) (Kennard, J., dissenting).

357. *Id.* at 946-47.

358. *See* text accompanying notes 247-93.

359. In California, however, the government tried to argue that all forms of discrimination were equally invidious. But the lead opinion did not need to address the hierarchy argument, because it did not need to determine whether the law reflected a compelling governmental interest.

cation of discrimination on those bases are considered to be government interests of tremendous importance. Thus, courts have argued in some conflicts cases that eradicating marital status discrimination is not a compelling governmental interest. The contention assumes that categories of discrimination are arranged in a hierarchy—hence, a "hierarchy of discrimination categories" argument.

The Massachusetts majority and dissent, the Alaska dissent, the pre-*Smith v. FEHC* California Court of Appeal opinions, and California dissents, determined that race and/or gender discrimination categories receive the strongest protection of the courts.[360] The discussions in the above opinions indicate that in cases involving statutes that protect against race or gender discrimination in housing, the infringement of free exercise rights is allowed.

The dissent in *Swanner* reasoned that in situations where courts have upheld anti-discrimination interests in lieu of a fundamental right, the courts have stated why those particular prevailing anti-discrimination interests deserve heightened scrutiny.[361] The dissent cited *Bob Jones University v. United States*,[362] which upheld the Internal Revenue Service's denial of the University's tax exempt status against a free exercise claim because of the institution's race discrimination practices, to illustrate the compelling interest in eliminating race discrimination.[363] Likewise the dissent also cited *Roberts v. United States Jaycees*[364] for the proposition that eradicating sex discrimination would prevail over a free exercise claim.[365]

Further, both California Court of Appeal opinions[366] discussed the hierarchy. In *Smith v. FEHC*,[367] the court of appeal stated that cases of conflict involving racial discrimination will always receive strict scrutiny on behalf of the anti-discrimination interest. Such review was not warranted by marital status discrimination.[368] In fact, the court concluded, "It is reasonable . . . to postulate that the Legislature did not intend all such classifications to be equal."[369]

Similarly, the court of appeal in *Donahue* noted that the focus in a conflicts case should be on the particular category of discrimination

360. *See* discussion *infra*.

361. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 287-88 (Alaska 1994) (Moore, C.J., dissenting), *cert. denied*, 115 S. Ct. 460 (1994) (Thomas, J., dissenting).

362. 461 U.S. 574 (1983).

363. *Swanner*, 874 P.2d at 288.

364. 468 U.S. 609 (1984).

365. *Swanner*, 874 P.2d at 288.

366. Both are depublished and one is expressly overruled.

367. Smith v. FEHC, 30 Cal. Rptr. 2d 395 (1994), *rev. granted*, 880 P.2d 111 (Cal. 1994), *aff'd in part, rev'd in part*, 12 Cal. 4th 1143, 913 P.2d 909 (Cal. 1996).

368. *Id.* at 404.

369. *Id.*

and "where the state's interest lies in the hierarchy of its policies which must be protected and promoted, even against constitutional challenges."[370] The *Donahue* court also noted the fundamental importance of eradicating race discrimination and that, in the scheme of discrimination categories, marital status discrimination did not rank very high.[371]

Like Justice Moore in the *Swanner* dissent, the Massachusetts Supreme Court indicated that eradication of race and sex discrimination was of paramount importance.[372] Marital status discrimination did not deserve the societal importance recognized by the court as did race and sex discrimination.[373] The *Desilets* court used the Massachusetts Constitution's "equality under the law" clause classifications of "sex, race, color, creed or national origin" to order its hierarchy of discrimination grounds.[374] Since marital status was not protected under that clause, marital status discrimination did not merit a higher standard of scrutiny.[375]

Finally, both California dissents noted that the governmental goal of eliminating marital status discrimination is not as compelling as eradicating race, ethnic, or gender discrimination. Justice Kennard stated, "There is no recent history or present practice of invidious discrimination against unmarried cohabiting heterosexual couples that is remotely comparable to the disgraceful and unhappy history of racial, ethnic, and gender discrimination."[376] Justice Baxter observed that, while there was no indication that the legislature intended categories to be arrayed in a hierarchy, there is also no evidence that they are to be treated similarly.[377] Not only did he find that marital status did not deserve the same level of scrutiny as race,[378] he also found protections for unmarried cohabitating couples not as great as those provided "single men and women, students, widows and widowers, divorced persons, and unmarried persons with children"[379]—though all are covered under the same "marital status" category of the housing discrimination statute.

370. 2 Cal. Rptr. 2d at 44 [Depublished].

371. *Id.*

372. Attorney Gen. v. Desilets, 636 N.E.2d 233, 239 (Mass. 1994).

373. *Id.*

374. *Id.* However, the dissent in *State v. French* commented that there was no precedent for distinguishing among types of discrimination and declined to do so. The analysis continued by finding that eliminating marital status discrimination was a compelling governmental interest. 460 N.W.2d at 2, 19 (Minn. 1990) (Popovich, C.J., dissenting).

375. *Id.*

376. Smith v. FEHC, 913 P.2d 909, 952 (Cal. 1996) (Kennard, J., dissenting).

377. *Id.* at 972 (Baxter, J., dissenting).

378. *Id.*

379. *Id.* at 973.

Thus, the importance of eradicating discrimination per se did not determine the balancing conducted by individual judges. Rather, the relative importance of the specific discrimination category within a hierarchy of such categories was used. As such, marital status discrimination did not receive much weight, and free exercise interests could more easily prevail.

It is easy to conclude that the majority of opinions discussing the hierarchy are those in favor of protecting the religious interest. The hierarchy is one tool to minimize marital status protection by comparing it to, and finding it of lesser importance than, other categories, such as race and gender. When the minimized marital status interest is balanced against the First Amendment free exercise interest, the result in favor of free exercise is predictable.

On the other hand, it is equally predictable that pro-marital status protection/pro-tenant decisions do not address the hierarchy argument.[380] First, they have only to find that protecting against marital status discrimination is a governmental interest of a compelling nature. It is irrelevant that there are other categories of discrimination which may be *more* compelling or that may receive different levels of protection. Second, it is difficult to reason that marital status deserves the protection that race and gender discrimination does, given that marital status does not have a similar history of oppressive and invidious discrimination.

Finally, the fact that pro-tenant decisions do not address the hierarchy analysis does not mean that an unstated hierarchy does not exist. Cases such as *Bob Jones University v. United States* and *Roberts v. United States Jaycees* make clear that, absent a statutory exemption, claims of race or gender discrimination will prevail over a free exercise claim, because eradicating those forms of discrimination is a compelling government interest. That conflicts cases arising in state supreme courts have only involved marital status discrimination is evidence that the balancing of *this* interest against free exercise is not so easily resolved.

380. Only one such pro-tenant decision addresses the hierarchy argument. Chief Justice Popovich's dissent in *State v. French* states: "[The landlord] cites no cases breaking up an anti-discrimination statute into discrete parts and finding the interest in eradicating certain types of discrimination to be less than compelling." 460 N.W.2d at 2, 19 (Minn. 1990) (Popovich, C.J., dissenting). To the extent he rejects it, he misstates the hierarchy argument. The hierarchy supposes that categories of discrimination are arranged in some relative order of importance and that, therefore, they receive varying degrees of protection. At some point amidst the vertically arranged categories, courts draw a horizontal line indicating that those categories falling above the line are compelling, those below are not. The hierarchy argument is a vehicle for arranging the categories along a vertical axis to begin with. It does not place the horizontal dividing line. It is, of course, possible for the line to be drawn below all of the categories, corresponding with a court's determination that all are to receive strict scrutiny.

Focusing on the above cases and the hierarchy argument, the case studies posed in the introduction can be addressed. Case study three involves a conflict between a race discrimination statute and free exercise. Given the hierarchy analyses above, there appears to be no question but that the tenant will prevail in this case. Race discrimination is not tolerated in the state jurisdictions discussed in this Note or in the federal court system. Undoubtedly, a court facing such a situation will address the history behind the civil rights movement, the history behind the FHA or other applicable housing discrimination statutes discussed in Part II of this Note, and the urgency felt in this country to eradicate such discriminatory treatment of prospective tenants.

In case study one, marital status discrimination protections are in opposition to free exercise rights. A court in a jurisdiction whose constitution grants broader free exercise protections than the First Amendment will likely find for the landlord. It will likely discuss the hierarchy, within which marital status discrimination is not given the full measure of deference against a free exercise challenge—it is not considered important enough to override state religious freedom guarantees. It is likely that the court will go to great lengths in its analysis to discuss the historical events giving rise to religious rights in America as presented in Part I of this Note. And by virtue of that history, great emphasis will be placed on the constitutional free exercise language.

On the other hand, states not favoring the religious interest will downplay the hierarchy argument or avoid it altogether. They may assert that the interest competing with free exercise is not the specific category of discrimination, but rather discrimination in housing as a whole, and then find the interest in eradicating such discrimination sufficient to burden free exercise. The court may also avoid the hierarchy argument by never addressing the balancing of interests, as occurred in California. By finding that the landlord failed to meet her initial burden of proving a substantial burden, the California Supreme Court never had to address the importance of eliminating marital status discrimination.

Case study two addresses the rights of gays and lesbians. However, to date, no state housing discrimination law protects against discrimination on the basis of sexual orientation.[381] It is conceivable that a housing discrimination claim based on sexual orientation is sex or marital status discrimination. No such case has arisen and it is difficult to assess the result a court would reach. Should a state add sexual

381. In fact, Colorado attempted to amend its constitution to refuse protective status to gays and lesbians. *See generally* Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

orientation to its constitution's equal protection clause, the case for a homosexual tenant or homosexual couple alleging discrimination would be better. The remaining issue would be its relative placement in the hierarchy.[382]

(7) The Degree to which State Constitutions, as Opposed to the Federal Constitution, Protect Free Exercise Rights

The federal free exercise analysis, pursuant to the United States Supreme Court's announcement in *E.D. v. Smith*, provides no exemption to a law burdening religious rights so long as the law is neutral and generally applicable.[383] Strict scrutiny is only mandated when another constitutional right is infringed.[384] RFRA, however, provides that strict scrutiny is to be applied notwithstanding *E.D. v. Smith*. In these state conflicts cases, however, each of the four state supreme courts further looked—to varying degrees—to their respective state constitutions to assess the standard of scrutiny that was required.[385] Minnesota and Massachusetts clearly stated that their state constitution provided broader free exercise protections than the Federal Constitution and applied the strict scrutiny standard to find in favor of the free exercise interest and the religious landlord.[386] Alaska and California, however, did not state that they would provide greater free exercise protections and found for the unmarried, prospective tenants. Thus, the relative degree of free exercise protection under the states'

382. In the California Supreme Court's *Smith v. FEHC*, Justice Kennard's dissent contains an interesting footnote to this issue. She stated: "My discussion of whether the state has carried its heavy burden of demonstrating a compelling state interest addresses only [the issue of religiously motivated discrimination against unmarried *heterosexual* couples.] Analysis of whether there is a compelling interest in eliminating discrimination against homosexual couples may well involve different considerations; homosexual couples have been subject to a quite different, and continuing, history of discrimination; also, their unmarried status is not a matter of voluntary choice." Smith v. FEHC, 913 P.2d 909, 952 n.7 (Cal. 1996) (Kennard, J., dissenting). The comment is interesting because she does not state whether the basis of a similar conflicts claim would also be the law protecting "marital status." She did not observe that the law does not explicitly protect on the basis of sexual orientation.

383. 494 U.S. at 872, 879 (1990).

384. *Id.* at 881.

385. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994), *cert. denied*, 115 S.Ct. 460 (1994) (Thomas, J., dissenting); Smith v. FEHC, 913 P.2d 909, 929; Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); State v. French, 460 N.W.2d 2, 8 (Minn. 1990).

386. To clarify, however, Massachusetts remanded the case for a determination of whether the state had the requisite compelling interest. But the court hinted that the answer should be in the negative. Also, though the Minnesota majority, quoted above, had only three votes when addressing this issue, the dissent agreed that the compelling governmental interest test should apply.

constitutions can be an indicator of the result state courts will reach in conflicts cases.

For example, Minnesota clearly stated that its constitution provided for greater free exercise rights than granted by the First Amendment. The Minnesota Supreme Court stated: "[W]e interpret the Minnesota Constitution as requiring a more stringent burden on the state; it grants far more protection of religious freedom than the broad language of the United States Constitution."[387] The state of Minnesota would have to satisfy the court, as required by its own state constitution, that it had a compelling interest in eradicating marital status discrimination in housing in order to overcome free exercise burdens.[388] Likewise, the Massachusetts Supreme Court determined that it would apply the strict scrutiny standard articulated in *Sherbert* and *Yoder*.[389] The court stated, "By applying the balancing test as we do, we extend protections to the [landlords] that are at least as great as those of the First Amendment."[390]

On the other hand, California and Alaska decided in favor of the tenants and did not decisively state that their state constitutions offered broader free exercise protections than the Federal Constitution. Prior to the California Supreme Court's decision in *Smith v. FEHC*, that state's courts of appeal opined that their state constitution did offer such broader protections. Both *Donahue*[391] and *Smith v. FEHC*[392] determined that the California Constitution offered such extended guarantees and required that the heightened standard of strict scrutiny be applied. The California Supreme Court then confused the matter in *Smith v. FEHC*. After dismissing with the landlord's claim under a federal analysis, the court turned to its own constitution and initially notes that "California courts have typically construed the [free exercise] provision to afford the same protection for religious exercise as the federal Constitution before [*E.D. v. Smith*]"—i.e. they applied the *Sherbert* standard.[393] The plurality then determined that "[o]lder cases . . . suggest an approach closer to that of . . . [*E.D. v. Smith*] . . . [requiring] . . . the application to a religious objector of a neutral, generally applicable law."[394] Without clarifying the issue, the court concluded that the landlord's claim fails under either the lesser *E.D. v. Smith* analysis or the more expansive *Sherbert* free exercise

387. *French*, 460 N.W.2d at 9.
388. *Id.*
389. *Desilets*, 636 N.E.2d at 236.
390. *Id.*
391. 2 Cal. Rptr. 2d at 39 [Depublished].
392. Smith v. FEHC, 30 Cal. Rptr. 2d 395, 408-09 (1994), *rev. granted*, 880 P.2d 111 (Cal. 1994), *aff'd in part, rev'd in part*, 12 Cal. 4th 1143, 913 P.2d 909 (Cal. 1996).
393. Smith v. FEHC, 913 P.2d 909, 930 (Cal. 1996).
394. *Id.* at 930.

analysis.[395] Thus, the nature of California's free exercise rights is uncertain. Further, as one dissent observed, the plurality failed to address whether California's protections could offer broader protection than those provided under either of the two proffered standards.[396]

The extent of Alaska's free exercise protections is also unclear. Pursuant to its state constitution, the majority initially appears ready to apply a high level of scrutiny. The opinion states that the "'[r]eligiously impelled actions can be forbidden only "where they pose some substantial threat to public safety, peace or order," or where there are competing governmental interests "of the highest order and . . . [which are] not otherwise served. . . ."'"[397] The court seems to be calling for the strict scrutiny standard. Yet the court later articulates the meaning of this test and explains that the test poses the question "'whether that [discrimination] interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue.'"[398] This changes the analysis entirely. The rephrased question is easily answered in the affirmative because it does not require that the discrimination interest be compelling or of a high order. Rather, the interest, no matter what it is, need only "suffer" for the religious exemption to be denied. Therefore, after meaning is attached to the words, it does not appear that Alaska applies strict scrutiny to conflicts cases.

In summary, the two states that did not explicitly state that they were applying the *Sherbert / Yoder* strict scrutiny standard found in favor of the discrimination interest. Those states that determined to apply such a high standard indicated, in the least, or concluded, at most, that the religious interest should prevail.

C. A Solution to the Balancing Dilemma: The Status of the Landlord Exception

A case involving an injury from another's illegal discriminatory act and a free exercise defense for such an action presents the court with a difficult conflict. Both free exercise protection and the initial discrimination prohibition were essential, at the time of their ratifica-

395. *Id.* at 930-31.

396. *Id.* at 977 (Baxter, J. dissenting). Given the ultimate vote of four for the outcome, and the three votes for the lead opinion leaving the issue open, there does not appear to be significant support for the idea that free exercise protection is broader than would exist under a *Sherbert* standard. Indeed, the Baxter dissent does not argue for broader protection, but rather points to the logical flaw in not at least addressing the possibility.

397. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 (Alaska 1994) (quoting Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979))), *cert. denied*, 115 S. Ct. 460 (1994).

398. *Swanner*, 874 P.2d at 282 (quoting *Frank*, 604 P.2d at 1073).

tion or passage, for the cohesion of the nation. Both were debated in Congress and in the states. When threatened, both invite strong emotional responses from highly organized groups of people.[399]

This Note has almost exclusively dealt with the conflict between free exercise rights and statutory *marital status* discrimination protections, rather than general discrimination or other discrimination categories. I have distinguished among the categories because, in the cases discussed, not all of the categories have received, or deserve to be provided, the same levels of protection. Specifically, while both race and gender discrimination interests have earned a high degree of stature amongst the hierarchy of discrimination categories, marital status has not. In fact, it does not appear that either federal or state legislatures or courts will elevate marital status to the highest level of protection. Marital status discrimination does not have the negative history that race and gender discrimination have, and marital status discrimination does not seem *as* offensive to many. Thus, I have preferred to separate and distinguish amongst the categories, rather than to discuss housing discrimination as a whole.

399. An interesting free exercise/discrimination case involving a religious university has arisen in the District of Utah. The American Civil Liberties Union, acting on behalf of named testers, filed suit alleging gender discrimination against apartment owners who had contracted with Brigham Young University (BYU) to provide housing to BYU students. Wilson v. Glenwood Intermountain Properties, Inc., 876 F. Supp. 1231 (D. Utah 1995).

Students of BYU must live in university-approved housing or live on campus, but there is not enough dormitory space on campus for all of the University's students. Apartment owners enter into a contract with the University which enumerates requirements the owners must meet to qualify for BYU approval: among them is a requirement that single student housing must be segregated according to gender. As a result, some apartment owners offer housing to only one gender. Testers attempted to acquire housing at several complexes which housed only students of the opposite sex.

Unlike cases discussed in this Note above, the ACLU's suit involves the free exercise rights of a religious institution, rather than just the rights of an individual landlord. Brigham Young University's motive in contracting with the apartment owners is to provide places to live in accordance with its sponsoring religion's tenets. The apartment owners' motive, of course, is profit. Without the University's approval, students, comprising a substantial percentage of the tenant market, are not permitted to live in their complexes.

On the one hand are gender discrimination prohibitions which are granted a high level of protection in the hierarchy of discrimination categories. On the other hand are the free exercise rights of a religious university to provide off-campus housing conforming with its standards and of the students to live in places where their religious lifestyle will not be infringed upon.

The district court granted summary judgment in favor of the apartment owners and BYU, as intervenor. The court found that the testers were denied housing not because of gender discrimination, but because they were non-students. The complexes' policy of only renting to students does not violate the FHA and the testers' status as non-students proved that they were not "otherwise qualified," aside from being the wrong gender, to rent at the complexes in question. Joan O'Brien, *Landlords Can Rent Only to BYU Students*, THE SALT LAKE TRIBUNE, Feb. 2, 1995, at B1.

Furthermore, for the majority of this Note, race and gender discrimination have been removed from the equation *not* because they are inapplicable to the housing discrimination/free exercise conflict, but because the outcome of balancing those categories of discrimination against free exercise is certain: absent a specific statutory exemption, the discrimination interests prevail. The difficulty of balancing arises only when a "lesser" category of discrimination—specifically, marital status[400]—is implicated.[401]

The various outcomes of state supreme courts on this balancing issue demonstrate the extremity of the choice that has been made. Though Massachusetts remanded to the trial court for final determination and Minnesota's resolution did not turn on the exemption analysis, both states strongly indicated a preference for the free exercise interest while Alaska and California opted for the marital status protection interest. But neither outcome is entirely sensible when confronted with various hypotheticals. It does not seem reasonable to allow a "Donald Trump"-type of landlord to discriminate in renting his 100-unit apartment building, after a state renders a decision in favor of free exercise. On the other hand, the widower desiring to rent one bedroom in his home seems unduly burdened by the anti-discrimination laws that forbid him from favoring a married, versus an unmarried couple.[402] The difference between the two scenarios, and therefore the logical place to begin to formulate a proposal, is the status of the landlord. The end result of the following proposal is that small landlords would be granted reasonable allowances for their free exercise rights, whereas large landlords would have no right to discriminate on the basis of marital status, their free exercise arguments notwithstanding.

To remedy unreasonable results from a holding that the discrimination interest prevails under all circumstances, a statutory exemption for small landlords could be created. For example, a homeowner renting one or more rooms in his home could be afforded the right to free

400. So far, sexual orientation is not a protected category in any of the four states discussed in this Note. There is no claim to bring after being discriminated against on such a basis without the category being listed in the statute. Other allegations such as gender or marital status discrimination can be made in lieu of sexual orientation discrimination, but it is unclear how the courts will treat such claims. No such case has arisen. Were it ever to be added to housing discrimination statutes, it is unclear whether it would receive the same high level of protection as the race and gender classifications.

401. Indeed, cases of marital status discrimination and sexual orientation discrimination will arise in greater frequency in the future. Religious sects with tremendous followings, such as the Roman Catholic Church, do not condone homosexuality or living together outside marriage. Thus, the bulk of such conflicts cases are likely to arise in either of these contexts.

402. The above hypotheticals, and any other possible scenarios, presume that race and gender discrimination are not tolerated.

exercise through a simple exemption in the state's housing discrimination statute. California's Fair Employment and Housing Act[403] will serve as an example. It easily could be amended to provide that, with respect to marital status only, unlawful acts would not include failing to rent room(s) in an owner-occupied single family residence or unit(s) in a private dwelling containing no more than four units, so long as the owner/landlord occupied one of those units. Such an exemption does not go much further than the present statute[404] and its predecessor.[405] Current California Government Code section 12927(c) states: "'[D]iscrimination' does not include refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than *one roomer or boarder* is to live within the household."[406] The statute already provides a minimal exemption for an owner-occupied home, but fails to go far enough. Obviously, an exemption from the marital status prohibition would require that *two renters* (per room) be accommodated. Thus, the current provision for only one renter does not solve the above homeowner's problem; a slight numerical modification is needed.[407]

California's Rumford Fair Housing Act,[408] the predecessor of the Fair Employment and Housing Act, serves as a model for drafting a reasonable exemption for small, privately-owned, owner-occupied dwellings. This act prohibited only discrimination "in the sale or rental of public assisted housing accommodations and in any private dwelling containing more than four units."[409] Such a provision does not seem unreasonable with respect to protecting free exercise interests in the face of marital status protections, so long as the owner of the dwelling occupies one of the four or less units.

Such accommodations for free exercise can rather easily be made but should be confined to situations involving small landlords in the limited circumstances outlined above. The statutory exemption focuses on landlords who, rather than controlling large numbers of units of housing from afar, rent minimal rooms or units. The small landlord's free exercise argument is strong in these cases for the following reasons: the landlord seeking an exemption is living within close

403. CAL. GOV'T CODE §§ 12900-12996 (West 1992).

404. *Id.*

405. CAL. HEALTH & SAFETY CODE §§ 35700-35744 (West 1973) (repealed 1980). This act did not protect on the basis of marital status. *See id.* § 35720.

406. § 12927(c) (emphasis added).

407. Interestingly, this exception appears to allow for limited race and gender discrimination. This Note's proposal, however, does not permit discrimination on those bases.

408. *See supra* note 374.

409. Hill v. Miller, 415 P.2d 33, 34 (Cal. 1966) (quoting Cal. Health & Safety Code §§ 35710, 35720).

proximity to the activity he finds religiously objectionable, and the extent to which his activity is "commercial" is limited. Further, only marital status discrimination—a "lesser" category of discrimination—is minimally compromised. Thus, state supreme court decisions opting on the side of the discrimination interest are easily remedied to allow for limited exercises of religious freedom.

On the other hand, to the extent courts' decisions hold that free exercise interests trump discrimination protections in all circumstances, they could often be impractically applied. It is unreasonable to allow the owner of a large housing enterprise to freely discriminate because of his religious convictions. Furthermore, courts are the appropriate vehicle to carve out exceptions to a free exercise rule just as legislatures are there to create exemptions to an anti-discrimination rule. Such a court could hold that landlords of dwellings consisting of greater than four units, or landlords renting rooms in homes that they do not occupy themselves, must abide by the housing discrimination statutes notwithstanding free exercise rights. This proposal utilizes the same language to provide a similar exemption as was suggested in the case of states with pro-discrimination interest decisions. The court would use the commerce argument discussed above to find that the burden requirement is not met or that the landlord's free exercise rights are limited when acting in a commercial setting. The reasoning would be that such landlords are operating a larger scale commercial enterprise, rather than a small business in which they would live and work in close proximity to those whom they desire to refuse tenancy. Therefore, larger rental businesses do not have a strong substantial burden argument because the personal nature of free exercise rights is overcome by the larger scale of the commercial operation within which the discriminatory action occurs. The free exercise burden imposed by the discrimination statutes in these cases does not appear very great.

The above recommendation for states who would otherwise opt to emphasize free exercise rights over the discrimination interest obviously serves to suggest options for states who have yet to determine their policies in this particular situation. States that have selected the free exercise interest have done so unconditionally, without carving out exceptions for large landlords whose operations are predominantly commercial or whose units are not located near to where they live. Those states would likely declare the recommendation unconstitutional because it curtails their First Amendment rights and would argue that restricting access to the free exercise argument unfairly disadvantages large landlords. However, the California Supreme Court has effectively held that where landlords have voluntarily entered into a particular business subject to regulation, they are obliged to follow that regulation. The landlord, of his free will, chose to undertake the

particular commercial activity and cannot exempt himself from applicable laws. Likewise, the landlord economically disadvantages himself by refusing to rent to those who are otherwise qualified tenants.

The above proposals have the practical result of differentiating between landlords on the basis of the size of their commercial operation and the proximity of the landlords to the religiously displeasing activity. The suggestion also has the legal consequence of minimizing the necessity of choosing one interest over the other; the practical result is the same under either a pro-free exercise or a pro-discrimination statute holding. Rather than having groups of states on either side of the equation, all states could have the same reasonable rules to apply in this free exercise/discrimination conflict. The only questions for courts to address would be factual—to determine the size of the landlord's operation and whether the landlord is living in the dwelling himself—and then the court would apply the corresponding rule.[410]

Conclusion

The disparity in outcomes among the four state decisions to grapple with the conflicts issue indicates the difficulty of the balancing task the courts undertook. It is impossible to say, on balance, one state's conclusion is "correct," while another is "wrong." This is just one of the many conflicts that courts must face and that make the law interesting to study as it evolves. One state's high court determines that its state's free exercise clause is more historically entrenched that marital status protections, or more important, or both. Another state decides that the discrimination interest deserves more protection. Many situations are reasonably resolved by either conclusion. The challenge is to

410. The proposal would be applied to the three case studies presented in the introduction to this Note as follows: Case study one involves marital status discrimination. The religious landlord refusing to rent to the couple owns several apartment buildings. Assuming either that the landlord does not live in the complex or that the dwelling contains greater than four units, he should not be granted a free exercise exemption. In this case, the landlord's free exercise argument would not be strong because his enterprise is undoubtedly commercial and he does not live in close proximity to the act considered sinful.

In case study two, sexual orientation discrimination is at issue. As discussed previously in this Note, sexual orientation is not yet a protected category under the FHA or any of the state housing discrimination statutes discussed. If a sex discrimination claim can be sustained, the couple would prevail. But to the extent that they would make a marital status discrimination argument, under this proposal, they would lose because the unit desired to be rented is annexed to a private home, presumably occupied by the religious landlord. An exemption would therefore be afforded the landlord.

Finally, case study three is the easiest case. Race discrimination claims will prevail over free exercise interests because they are founded upon statutes that have been determined to reflect compelling government interests. Therefore, under both strict scrutiny and a lesser standard, the tenant discriminated against on the basis of race (or gender) will win.

find solutions for those situations for which a state's chosen rule fails to reach a reasonable result. So far, only four states have addressed the issue and have failed to identify landlord status as the determinate criterion. Perhaps in the future, other states will provide more insight and legislatures will creatively craft resolutions for this emotionally-charged conflict, that go far enough, but no further than necessary, to preserve religious freedoms without compromising this country's dedication to eradicating discrimination.